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Supreme Court of the United States

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, WHO SUES AS THE ADMINISTRATRIX OF THE ESTATE OF HURY O. REYNOLDS, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED AUGUST 19, 1948.

CERTIORARI GRANTED OCTOBER 25, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

MRS. MARIE REYNOLDS, WHO SUES AS THE ADMINISTRATRIX OF THE ESTATE OF HURY O. REYNOLDS, DECEASED, PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA

CERTIFICATE OF APPEAL

I, O. L. Andrews, Clerk of the Circuit Court in and for said County and State, do hereby certify that in the cause of Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, Appellant, vs. Atlantic Coast Line Railroad Company, a corporation, Appellee, which was tried and determined in this Court on the 2 day of July, 1947 wherein non-suit was declared and entered, the pltff. prayed for and obtained an appeal to the Supreme Court of Alabama, to be holden in and for said State.

I further certify that on the 10 day of Sept., 1947, notice the plaintiff filed Security for costs of appeal to the Supreme Court of Alabama, and that J. K. Reynolds, Erle Pettus and Al G. Rives are sureties on said security for costs for all costs of said appeal.

I further certify that on the 13th day of Sept., 1947, notice of appeal was du y served on Graham, Bibb & Wingo, Attorneys of record for said Appellee.

Witness my hand and seal of Office this the 15 day of Sept., 1947.

O. L. Andrews, Clerk Circuit Court, Tenth Judicial Circuit of Alabama. (Seal.)

[fol. 4] IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

Number 13390-X

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased, Plaintiff,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Defendant

AGREEMENT TO ABRIDGE RECORD ON APPEAL—Filed November 18, 1947

The parties in the above cause, by and through their respective attorneys of record, do hereby mutually agree that

the record of this cause on appeal may be abridged, as provided under Rule 28, Rules of Practice of Supreme Court of Alabama, Title 7 of 1940 Code of Alabama, so that the record on appeal will not include Counts One to Nine, both inclusive, of plaintiff's complaint, it being expressly understood and agreed by the parties that the record on appeal shall only contain Counts Ten, Eleven and Twelve of plaintiff's complaint, together with all other proceedings had in the cause.

Jackson, Rives and Pettus, by Herbert W. Paterson, as Attorneys of Record for Plaintiff; Graham, Bibb, Wingo and Foster, by Peyton D. Bibb, as Attorneys of Record for Defendant.

Filed in office Nov. 18, 1947.

[fol. 5] IN THE CIRCUIT COURT OF SAID COUNTY

SUMMONS

To Any Sheriff of the State of Alabama—Greeting:

You are hereby commanded to summon Atlantic Coast Line Railroad Company, a corporation, to appear before the Circuit Court of said County, to be held at the place of holding the same, within thirty days from service of this process then and there to answer the complaint of Mrs. Marie Reynolds, who sues as the Administratrix of the Estate of Hury O. Reynolds, deceased.

Witness my hand this 26th day of August, 1946.

O. L. Andrews, Clerk.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

COMPLAINT—Filed July 2, 1947

Count Ten

The plaintiff, who sues as the administratrix of the Estate of Hury O. Reynolds, deceased, and for the use and benefit of herself as the widow of the said Hury O. Reynolds, deceased, claims of the defendant the sum of to-wit, one hundred thousand ($100,000.00) dollars as damages for that heretofore, on, to-wit, the 10 day of November, 1945, the defendant was engaged in the business of transporting

freight as a common carrier by railroad, and as such common carrier was engaged on said date in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commerce or freight originating in the state of Florida destined and moving to a point or place outside of the state of Florida or originating at a point or place without the state of Florida, and destined to or moving to a point or place within the state of Florida, and the plaintiff avers that on said date, to-wit the 10th day of November, 1945, the said Hury O. Reynolds was an employee of the defendant on one of the defendant's freight trains, known as freight train Number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while [fol. 6] the said Hury O. Reynolds was acting within the line and scope of his employment by the defendant, and in and about the transportation of interstate commerce by railroad, the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds was riding in the performance of his duties for the defendant at said time and place, and the plaintiff avers that said railroad train of the defendant consisted of the engine and tender, approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida and that the said Hury O. Reynolds in and about said switching operations was required to act and did begin to act as the socalled footboard brakeman and as such brakeman, shortly before arriving at the point where he was injured and killed, he had taken his position on the lead end of the sixth (6th) car from the

caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the car upon which the said Hury O. Reynolds was riding at said time and place upon said side track as aforesaid and upon nearing the switch leading into said side track, where said ten (10) cars were to be spotted, the said Hury O. Reynolds was required to pass a signal to the engineer so as to inform the engineer as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible to the engineer, the said Hury O. Reynolds was required to give said signal while suspended from engineer's side of said moving train, and the plaintiff avers that if the defendant had not negligently failed to provide the said Reynolds with a reasonably safe place to work as aforesaid, the said Reynolds would have descended the engineer's side of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car, but because of the close proximity of said tall canes to the railroad track at said time and place, his said signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because [fol. 7] of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car as said gondola car passed the place where said tall canes were then and there growing, the said Reynolds was caused to cross over the front end of said gondola car in order to climb aboard a tank car immediately in front of said gondola car as from the side of said tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes and as he could give said signal from the side of said tank car which would be visible to the engineer, and the plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid, the said Reynolds was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of his duties at said time and place, had the defendant not negligently failed to provide him with a reasonably safe place to work in negligently allowing said tall canes to be and remain in close proximity to said rail-

road track at said place. And the plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train he fell from said train and was run over by said train and was injured so that he died.

And the plaintiff avers that the injuries and death of her husband and intestate, the said Hury O. Reynolds, was proximately caused by the negligent failure of the defendant to provide him with a reasonably safe place to work as aforesaid and plaintiff avers that on account of and as a proximate consequence of the death of the said Hury O. Reynolds, the plaintiff as his widow and total dependent suffered great pecuniary loss. Plaintiff further avers that this action is brought under what is generally known as the Federal Employer's Liability Act.

Count Eleven

The plaintiff, who sues as the administratrix of the estate of Hury O. Reynolds, deceased, and for her use and benefit as the widow of the said Reynolds, deceased, claims of the defendant the sum of One Hundred Thousand Dollars ($100,000.00) as damages for that heretofore on to-wit, the 10th day of November, 1945, the defendant was engaged in the business of transporting freight as a common carrier by railroad and as such common carrier was engaged in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commercial freight originating in the State of Florida destined and moving to a point [fol. 8] or place outside of the State of Florida, or originating at a point or place without the State of Florida and destined or moving to a point or place within the State of Florida, and the plaintiff avers that on said date, to-wit, the 10th day of November, 1945, the said Reynolds was an employee of the defendant on one of the defendant's freight trains known as freight train number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while the said Reynolds was acting within the line and scope

of his employment by the defendant and in and about the transportation of interstate commerce by railroad; the defendant negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties required of him and his fellow servants at said time and place in this, that the defendant furnished as a brakeman to work with Reynolds on said train at said time and place one W. E. Skelly who the plaintiff avers was incompetent and unskilled as a railroad brakeman and who had he been a competent and skilled railroad brakeman at said time and place would have been required, in the performance of his duties with the defendant, as the train upon which the said Reynolds and the said Skelly were then and there riding neared the switch at the junction of the main line of the Florida-East Coast Railroad Company with the Florida-East Coast exchange track located at Lake Harbor, to give a signal which would be visible to the engineer at the head of said train so as to inform the engineer as to the point where said train should be stopped preparatory to engaging in a switching movement and the plaintiff avers that because the said Skelly was incompetent and incapable of performing his said required duties as a railroad brakeman at said time and place the said Reynolds as the only other brakeman on said train at said time and place was required to undertake the performance of the duties of the said Skelly as a railroad brakeman at said time and place, the said Reynolds being thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train and the plaintiff avers that while the said Reynolds was engaged in the performance of the duties of the said Skelly and the conductor was engaged in [fol. 9] the performance of the duties of the said Reynolds and while the said Skelly was standing idly by and not engaged in the performance of any duties whatsoever, the said Reynolds fell between two cars of said moving train and was run over by said train and was injured so that he died on said date. And the plaintiff avers that the death of the said Reynolds was a proximate consequence of the negligence of the defendant in negligently failing to provide the said Reynolds with an adequate number of competent fellow servants as aforesaid and plaintiff avers that as a proximate consequence of the death of the said Rey-

nolds, the plaintiff as his widow and total dependent, suffered great pecuniary loss all as aforesaid. The plaintiff avers that this action is brought under what is generally known as the Federal Employer's Liability Act.

Count Twelve

The plaintiff, who sues as the administratrix of the Estate of Hury O. Reynolds, deceased, and for the use and benefit of herself as the widow of the said Hury O. Reynolds, deceased, claims of the defendant the sum of, to-wit, one hundred thousand ($100,000.00) dollars as damages for that heretofore, on, to-wit, the 10th day of November, 1945, the defendant was engaged in the business of transporting freight as a common carrier by railroad, and as such common carrier was engaged on said date in transporting interstate commerce by railroad in Palm Beach County, Florida, that is, commerce or freight originating in the state of Florida destined and moving to a point or place outside of the state of Florida or originating at a point or place without the state of Florida and destined to or moving to a point or place within the state of Florida, and the plaintiff avers that on said date, to-wit, the 10th day of November, 1945, the said Hury O. Reynolds was an employee of the defendant on one of the defendant's freight trains, known as freight train Number 567, and as such employee of the defendant, while acting within the line and scope of his employment by the defendant, was engaged in the transportation of interstate commerce by railroad in Palm Beach County, Florida, at or near Lake Harbor in said county and state, and the plaintiff avers that at said time and place, while the defendant was engaged in the transportation of such interstate commerce by railroad and while the said Hury O. Reynolds was acting within the line and scope of his employment by the defendant, and in and about the transportation of interstate commerce by railroad, the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the [fol. 10] defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds

was riding in the performance of his duties for the defendant at said time and place, and that the defendant further negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties required of him and his fellow servants at said time and place in that they provided as one of the two brakemen on said train one W. E. Skelly, the said Reynolds being the other brakeman, and the plaintiff avers that the said Skelly was incompetent and unfit properly to perform and discharge the duties which were assigned to him at said time and place as a footboard brakeman as a part of the following switching movement: the railroad train of the defendant consisted of the engine and tender approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida, in connection with which the said Skelly, had he been competent and reasonably skilled as a railroad brakeman, would have been required to take his position on the lead end of the sixth car from the caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the sixth car upon said side track and upon nearing the switch leading into said side track where said ten (10) cars were to be spotted, the said Skelly, had he been reasonably skilled and competent as a railroad brakeman would have been required to pass a signal to the engineer so as to inform him as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible — the said Skelly, had he been reasonably skilled and competent as a railroad brakeman, would have been required to give said signal while suspended from the engineer's side of said moving train, but because the said Skelly was not reasonably skilled and competent as a railroad brakeman the said Reynolds was required to undertake and perform the said duties of the said Skelly and the said Reynolds was thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train. The plaintiff avers that if the defendant had not negligently failed to provide a reasonably safe place to work and per-

[fol. 11] form the duties of the said Skelly which were then

and there being performed by Reynolds the said Reynolds would have descended the engineer's side at the head end of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car but because of the close proximity of said tall canes to the railroad track at said time and place, his signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car, as said gondola car passed the place where said tall canes were then and there growing the said Reynolds was caused to cross over the front end of said gondola car to climb aboard a tank car immediately in front of said gondola car as from the side of said tank car he would have been above the tops of said tall canes where said canes would not strike him as the moving train passed and where he could give said signal from the side of said tank car which would be visible to the engineer. The plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid the said Reynolds in the performance of the duties which would have been performed by the said Skelly had he been reasonably skilled and competent as a railroad brakeman, was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of such duties had the defendant not negligently failed to provide a reasonably safe place to work in allowing said tall canes to be and remain in close proximity to said railroad track at said place. The plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train, he fell from the said train and was run over by said train and was injured so that he died.

The plaintiff avers that the injuries and death of her husband and intestate, the said Hury O. Reynolds, was proximately caused by the negligent failure of the defendant to provide him with a reasonably safe place to work as aforesaid and the negligent failure of the defendant to provide him with an adequate number of competent fellow servants as aforesaid as a proximate consequence of all of

which the said Reynolds was injured so that he died and the plaintiff as his widow and total dependent suffered great pecuniary loss. The plaintiff avers that this action is brought under the Federal Employers Liability Act.

[fol. 12] Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for the Plaintiff.

Filed in open court July 2, 1947.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

SHERIFF'S RETURN

Executed this the 28th day of Aug. 1946 on Atlantic Coast Line Railroad Company, a corporation by leaving a copy of within with Guy Creasey, Agent of said Company.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, by Ben L. Ingram, D. S.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

DEMURRER

Comes the defendant the Atlantic Coast Line Railroad Company, by its Attorneys, and demurs to the plaintiff's complaint and assigns the following separate and several grounds of demurrer:

1. For that the averments thereof are insufficient to state a cause of action as for negligence against this defendant.

2. For that averments thereof are insufficient to constitute actionable negligence as against this defendant.

3. For that it does not appear therefrom with sufficient certainty how or wherein this defendant violated any duty it owed to the plaintiff's decedent.

4. For that it is not alleged with sufficient certainty what act or acts of the alleged servants or employees of this defendant negligently caused the alleged injury and death of plaintiff's decedent.

5. For that the allegations thereof are insufficient to show negligence on the part of a servant or employee of this

defendant as the proximate cause of alleged injury and death of plaintiff's decedent.

6. For that two separate and distinct causes of action are joined in one and the same count.

7. For that it does not appear with sufficient certainty how plaintiff's decedent received or sustained his alleged injuries.

8. For aught that appears from the allegation thereof the alleged injury and death of plaintiff's decedent as an employee was within the provisions of the Florida Work-[fol. 13] men's Compensation Act and not covered by the Act of Congress known as the Federal Employers Liability Act.

9. For that the allegations that the plaintiff's intestate was engaged in or employed in interstate commerce at the time he received his alleged injuries are but conclusions.

Graham, Bibb & Wingo, by Peyton D. Bibb, Attorneys for Defendant, Atlantic Coast Line Railroad Company.

Filed in office September 23, 1946.

In the Circuit Court, Tenth Judicial Circuit.

Amendment to Demurrers

Comes now the defendant and amends its demurrers heretofore filed to the Complaint herein by filing the same, and assigning each ground of demurrer therein originally severally set out, to the Complaint and to each count thereof, separately and severally, so that each of said several grounds of demurrer are directed to the complaint and to each separate count thereof, separately and severally, and further amends its said demurrers by adding the following separate and several additional grounds of demurrer to the complaint and to each count thereof separately and severally:

10. For that the averments of said count, and particularly the averment that "defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to

work'' is vague, indefinite, and uncertain and insufficient at law to show that defendant violated any duty owed to plaintiff's intestate.

11. For that the averments of said count are insufficient to show negligence as a matter of law on the part of this defendant as the proximate cause of the alleged injury and death of plaintiff's intestate.

12. For that the averments of said count are insufficient to show a violation by this defendant of any duty to plaintiff's intestate.

13. For that the averments of said count are insufficient in that it is not averred or stated therein how or wherein the defendant negligently failed to furnish plaintiff's intestate a reasonably safe place to work.

Graham, Bibb, Wingo & Foster, Attorneys for Defendant.

Filed in open court July 2, 1947.

[fol. 14] IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

DEMURRER OF DEFENDANT TO COMPLAINT AS LAST AMENDED

Comes now the defendant, Atlantic Coast Line Railroad Company, a corporation, and demurs to the plaintiff's complaint, as last amended, and to each count thereof separately and severally, and to such complaint, as last amended, and to each count thereof separately and severally, reassigns, separately and severally, each separate ground of demurrer hereto assigned in its original and amended demurrers, and assigns separately & severally the following additional grounds of demurrer to-wit:

14. For that it sets forth mere conclusions of the pleader.

15. For that the allegation that ''Hury O. Reynolds was unable to safely go over the side of said train'' is a bare conclusion of the pleader.

16. For that the averment that plaintiff's intestate was ''caused to place himself in a position of danger'' where, if he fell, he would fall between the moving railroad cars is a conclusion.

17. For that the averment quoted in Ground 16, supra, is a conclusion based on conclusion.

18. For that the averment quoted in Ground 16, supra, is vague, indefinite and uncertain.

19. For that the averments thereof are vague, indefinite and uncertain.

20. For that the averment that plaintiff's intestate "was unable to safely give said signal from the side of the railroad car upon which he was riding" is a conclusion of the pleader unsupported by any allegation of facts.

21. For that the allegation that defendant "negligently failed to provide an adequate number of competent fellow servants" is vague, indefinite and uncertain.

22. For that the allegation that defendant "negligently failed to provide an adequate number of competent fellow servants" is vague, indefinite and uncertain, in that it is not alleged and does not appear with sufficient certainty as to whether the failure to so provide employees was with respect to competence or with respect to number.

23. For that the averments thereof are insufficient to show negligence as a matter of law on the part of this defendant as the proximate cause of the alleged injury and death of plaintiff's intestate.

24. For that the averments thereof affirmatively show that the alleged failure of the defendant to furnish plaintiff's intestate with a reasonably safe place to work was not [fol. 15] the proximate cause of his said alleged injury and death.

25. For that it affirmatively appears from the averments thereof that the alleged failure of the defendant to furnish plaintiff's intestate with a reasonably safe place to work did not proximately cause or proximately contribute to the alleged injury and death of plaintiff's intestate.

26. For that it affirmatively appears from the averments thereof that the proximate cause of the alleged injury and death of plaintiff's intestate was his own action.

27. For that it affirmatively appears from the averments thereof that the sole proximate cause of the alleged injury and death of plaintiff's intestate was his own action in leav-

ing a place of safety and assuming a position of danger which was obvious to a person of reasonable intelligence.

28. For that it does not sufficiently appear from the averments thereof that plaintiff's intestate was directed or instructed by the defendant, or any of its servants, agents or employees acting within the line and scope of their authority, to place himself in a position of danger as therein alleged.

29. For aught that appears therefrom the sole proximate cause of the alleged injury and death of plaintiff's intestate was his own voluntary act in leaving a place of safety and assuming a dangerous position.

30. For aught that appears from the averments thereof the alleged injury and death of plaintiff's intestate was caused by his own negligence in placing himself in a position known to him to be dangerous or in placing himself in a position the danger of which was so open to observation as to be apparent to a person of ordinary intelligence.

31. For that the averments thereof are insufficient to show any right of recovery by plaintiff against this defendant for the alleged injury and death of plaintiff's intestate Hury O. Reynolds.

32. For aught that appears from the averments thereof the sole proximate cause of the alleged injury and death of plaintiff's intestate was his alleged fall from the car on which he was riding and it does not sufficiently appear from the averments thereof how or wherein any failure by the defendant to furnish said intestate a reasonably safe place to work proximately caused or proximately contributed to such fall.

33. For that it does not sufficiently appear from the allegations thereof that the alleged failure to furnish plaintiff's intestate a reasonably safe place to work proximately caused or proximately contributed to his fall from the train.

[fol. 16] 34. For that it appears from the averments thereof that the immediate efficient cause of the alleged injury and death of plaintiff's intestate was his alleged fall from the car and it does not appear therefrom with sufficient certainty how or wherein any negligence on the part

of this defendant proximately caused or proximately contributed to his said fall.

35. It does not sufficiently appear from the averments thereof how or wherein any act or failure to act on the part of the defendant proximately caused or proximately contributed to the alleged fall of plaintiff's decedent from the train.

36. It is not sufficiently alleged how or wherein defendant was negligent in furnishing plaintiff's intestate an incompetent and unskilled fellow employee at the time and place complained of.

37. For that the averments thereof are inconsistent and repugnant.

38. For that the averments thereof are but the argument and speculation of the pleader.

39. For that it does not appear from the averments thereof with sufficient certainty how or wherein any defect or insufficiency, due to the negligence of the defendant, in defendant's cars, engines, appliances, machinery, track, road bed, works, bolts, wharves or other equipment proximately caused the alleged injury and death of plaintiff's intestate.

40. For that it does not appear from the averments thereof with sufficient certainty how or wherein any defect or insufficiency, due to the negligence of the defendant, in defendant's cars, engines, appliances, machinery, track, road bed, works, bolts, wharves or other equipment proximately caused or proximately contributed to the alleged injury and death of plaintiff's intestate.

41. For that the averments thereof do not sufficiently show how or wherein any alleged negligence of defendant in failing to provide an adequate number of competent fellow servants to work with plaintiff's intestate proximately caused or proximately contributed to the alleged injury and death of plaintiff's intestate.

42. For that it does not sufficiently appear from the averments thereof how or wherein the alleged incompetence of W. E. Skelly, the alleged fellow servant of the plaintiff's intestate, proximately caused or proximately contributed to

the fall of the plaintiff's intestate from the train on the occasion alleged.

43. For that the averments thereof were insufficient to show any right of recovery by the plaintiff herein against the defendant for the matters and things therein alleged.

[fol. 17] 44. For aught that appears from the averments thereof the plaintiff's intestate's own voluntary action brought into being the situation of danger in which plaintiff's intestate is alleged to have been at the time he is alleged to have fallen from the train and received the injuries from which he died.

45. For that the proximate cause of the alleged fall of the plaintiff's intestate from the train at the time alleged is not set out with sufficient certainty but is left to speculation and conjecture.

46. For aught that appears to the contrary from the averments thereof the route or method taken by plaintiff's intestate in going over the front end of said railroad car was a reasonably safe method or means of performing his alleged duties.

47. From aught that appears to the contrary from the averments of said count, the plaintiff's said intestate was provided by the defendant an alternate route of travel, to get to the place where he was to perform his said duties, which said alternate route of travel was used by the plaintiff's said intestate and was a reasonably safe place to work.

48. For aught that appears from the averments thereof and notwithstanding the alleged presence of tall canes growing and remaining in close proximity to the alleged railroad track the plaintiff's intestate was furnished a reasonably safe place to perform his alleged duties at the time and place alleged.

49. For aught that appears from the averments thereof the alleged danger incurred, or dangerous position assumed, by plaintiff's intestate in climbing or crossing over the front end of said railroad car at the time and place alleged therein was danger normally expected to be encountered in or attendant upon the type of work he was engaged in as a

member of the crew engaged in the operation of the alleged freight train.

49a. For that the averments thereof are insufficient to show any constraint upon plaintiff's intestate to continue working under the conditions alleged therein.

50. For that the averments thereof fail to show any constraint upon plaintiff's intestate to continue to perform his alleged duties in the manner therein alleged after he discovered that he was unable to safely go over the side of said train because of the existence of the alleged tall canes in alleged close proximity to the railroad tracks as therein set out.

51. For that it is not alleged therein with sufficient certainty that the alleged tall canes were allowed to grow and remain in dangerous proximity to the alleged railroad track at the time and place alleged.

[fol. 18] 52. For that it is not sufficiently alleged how or wherein the defendant negligently allowed the tall canes to grow and remain in dangerous proximity to the alleged railroad track at the time and place complained of.

53. For aught that appears from the averments thereof the plaintiff's intestate could have given the alleged signal to the engineer of said train at a place other than the place at which the alleged tall canes were alleged to have been growing in proximity to the track as therein alleged.

54. For that the averments thereof are insufficient in law to show that any act, order or instruction of the defendant or of any servant, agent or employee acting in the line and scope of their employment by the defendant caused or required the plaintiff's intestate to cross over the front end of said gondola car in order to perform any acts or duties after it was discovered or developed that the alleged existence of the tall canes in close proximity to the railroad track would prevent said intestate, Hury O. Reynolds, from giving the alleged signal to the engineer while Reynolds was suspended from the side of the railroad car as therein alleged.

55. For that the averments thereof do not sufficiently show that the alleged assumption by Hury O. Reynolds of the duties of his fellow employee, W. E. Skelly, was the

proximate cause of Reynolds' alleged fall from the railroad car.

56. For that the averments thereof are insufficient to show that the alleged assumption by plaintiff's intestate, Hury O. Reynolds, of the duties of his follow employee, W. E. Skelly, was the proximate cause of, or proximately contributed to said Reynolds' alleged fall from the railroad car.

57. For that there is a misjoinder of causes of action.

58. For that two separate and distinct causes of action are joined in one and the same count.

59. For that the averments thereof are unnecessarily prolix.

60. For that the allegation concerning "place of much greater danger" is but a conclusion of the pleader.

61. For that the allegation concerning "much safer duties" is but a bare conclusion.

62. No facts are alleged to show that the danger to the said Reynolds was increased by going to another car and over [fol. 19] its side rather than going over the side of the Gondola car, even if there had been no tall canes along the side of the track.

63. Construing the said count most strongly against the pleader, the danger to Reynolds was not a danger or hazard that he would fall but, rather a danger that would occur, if he did in fact fall.

64. No facts are set forth to show that Reynolds was more likely to fall in going from one car to the other and over its side than in going over the side of the car where he was, even in the absence of tall canes along beside the said initial car.

65. No incompetence or incapacity of the fellow servant is averred in any plausible or logical manner as contributing proximately to the death of the said Reynolds.

66. The allegations concerning a place of "great danger" are not supported by any facts averred.

67. From aught that appears the allegation of "great danger" has to do with the consequence ensuing if he fell rather than with the likelihood or probability of his falling.

68. No lack of an adequate number of competent fellow servants is relied upon in said count as contributing proximately to the death of the said Reynolds.

69. No improper act or unskilled act or act lacking in diligence of any fellow servant is averred as contributing proximately to the death of the said Reynolds.

70. The allegation concerning a place of "much greater danger" is an unauthorized comparison, unsupported by appropriate averments of facts.

71. The allegation concerning a place of "much greater danger" is but a mere and bald conclusion, unsupported by any facts.

72. It does not appear whether the allegation of a place of "much greater danger" has to do with the proposition that the place was one where Reynolds was more likely to fall; or, from aught that appears to the contrary, was less likely to fall, but, if he did fall, was more likely to receive a fatal injury.

73. The place of "much greater danger," from aught that appears to the contrary, may have been a reasonably safe place to work.

74. The allegation of "much safer place of work" is but a mere and bald conclusion of the pleader.

75. The allegation concerning a "much safer place of work" is entirely consistent with the fact that both places were reasonably safe places of work.

[fol. 20] 76. The allegation concerning a "much safer place of work" is entirely consistent with a status that the place where the work was being done when Reynolds fell and was killed was a reasonably safe place to work.

77. The allegation concerning a "much safer place of work" is uncertain and confusing, and construing the same most strongly against the pleader may well mean that the place where the work was being done when Reynolds fell was one where he was less likely to fall but one where, if he did fall, he would be more likely to receive a fatal injury.

78. The allegation concerning "much safer duties" is but a mere and bald conclusion of the pleader.

79. The allegation concerning "much safer duties" is consistent with the fact that the new duties were being performed at a place which was a reasonably safe place to work.

80. The said count combines two causes of action, namely, negligence in not furnishing a reasonably safe place to work, and negligence in furnishing a fellow servant who was not competent.

81. For that it appears from the averments thereof that the alleged danger to the deceased Reynolds was not a danger or hazard that he would fall from the train but rather a danger that would arise if he did in fact fall from the train.

Graham, Bibb, Wingo & Foster, Attorneys for Defendant.

Filed in open Court July 2, 1947.

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT

ORDER SUSTAINING DEMURRER AND GRANTING MOTION FOR NON-SUIT—July 2, 1947

Minute Entry

On this the 2nd day of July, 1947, came the parties by their attorneys, and plaintiff by separate paper filed adds Counts Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve, and strikes the words "weeds and" wherever said words appear together in the complaint; plaintiff in open court withdraws counts One through nine inclusive; defendant by separate paper filed amends demurrer by adding grounds 10 thr-u- 13; defendant by separate paper filed further amends demurrer by adding grounds 14 thr-u- 81; and defendant assigns each ground of the demurrer as amended, separately and severally, to Counts Ten, Eleven & Twelve, separately and severally; the demurrer as amended to each of said counts is by the court heard and considered, whereupon,

It is ordered and adjudged by the court that said demurrer be and the same is hereby sustained; on account of

[fol. 21] and solely because of the court's sustaining the amended demurrer to Counts Ten, Eleven and Twelve, the plaintiff moves the court for a non-suit, with notice of appeal to the Supreme Court, whereupon,

It is ordered and adjudged by the court that plaintiff's motion for non-suit be and the same is hereby granted and a non-suit in this case is hereby declared and entered, and that the defendant go hence without day and have and recover of the plaintiff all costs herein accrued for which execution may issue.

Security for costs on appeal omitted in printing.

[fol. 22] In the Circuit Court, Tenth Judicial Circuit of Alabama

Citation of Appeal to Supreme Court

To Atlantic Coast Line Railroad Company, a corporation, or Graham, Bibb & Wingo, their attorneys of record, Greeting:

Whereas, Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, has taken an appeal from the judgment by the Circuit Court of the Tenth Judicial Circuit of Alabama, for the County of Jefferson, State of Alabama, in the cause wherein Mrs. Marie Reynolds, who sues as administratrix of the estate of Hury O. Reynolds, deceased, is Plaintiff, and Atlantic Coast Line Railroad Company, a corporation, is Defendant.

Now, you are, therefore, cited to appear at the next Term 1947, of the Supreme Court of Alabama, to defend on said appeal, if you shall think proper to do so.

Witness my hand, this 11 day of September, 1947.

O. L. Andrews, Circuit Clerk.

Sheriff's Return

Executed this the 13th day of Sept., 1947, on Graham, Bibb and Wingo, Attorneys, by leaving a copy of within with D. P. Wingo, Agent of said Attorneys.

Holt A. McDowell, Sheriff, Jefferson County, Alabama, by Ben L. Ingram, D. S.

[fol. 23] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 24-25] In Supreme Court of Alabama

Specifications of Error

Now comes the appellant, Mrs. Marie Reynolds, who sues as the Administratrix of her husband, Hury O. Reynolds, Deceased, (Plaintiff Below) and says that in the trial and other proceedings had in this cause in the court below manifest error occurred to her great injury and damage as follows, to-wit:

1. For that the court erred in sustaining the defendant's demurrer to Count 10 of the plaintiff's complaint. (R. p. 20)

2. For that the court erred in sustaining the defendant's demurrer to Count 11 of the plaintiff's complaint. (R. p. 20)

3. For that the court erred in sustaining the defendant's demurrer to Count 12 of the plaintiff's complaint. (R. p. 20)

4. For that the court erred in sustaining the defendant's demurrer to the plaintiff's complaint. (R. p. 20).

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Appellant.

[fol. 26] The State of Alabama, Judicial Department, The Supreme Court of Alabama, October Term, 1947-48

6 Div. 643

Marie Reynolds, Admrx.

v.

Atlantic Coast Line Railroad Co.

Appeal from Jefferson Circuit Court

Opinion—June 24, 1948

Livingston, Justice:

This is an action under the Federal Employers' Liability Act by Mrs. Marie Reynolds, who sues as the administratrix

of the estate of her husband Hury O. Reynolds, deceased, against the Atlantic Coast Line Railroad Company to recover damages for his death (45 U. S. C. A., sections 51, *et seq.*).

The complaint as originally filed and as subsequently amended consisted of twelve counts. Under Rule 28 of this Court, however, the record has been abridged, and for the purposes of this appeal the complaint consists only of counts 10, 11 and 12.

Defendant's amended demurrer to counts 10, 11 and 12 of the complaint was sustained, and because of this adverse ruling plaintiff suffered a nonsuit, and reserved that ruling for this Court's decision. There is thus here presented the single question of the sufficiency of counts 10, 11 and 12.

In count 10, after the required averments of interstate commerce, the plaintiff alleged that her husband had been killed on November 10, 1945, near Lake Harbor, Florida, while working as a member of the train crew of defendant's freight train No. 567. The culpability ascribed was that defendant failed to furnish the deceased with a reasonable safe place to work. It was alleged that freight train No. [fol. 27] 567 consisted of an engine and tender and sixteen cars and a caboose; that the ten cars immediately behind the tender were to be cut out of the train at Lake Harbor, and left upon a siding there; that in connection with the intended switching movement, the deceased had taken his position at the lead end of the sixth car ahead of the caboose (and just back of the lead ten cars), where the train was thus to be uncoupled; that as said freight train approached the point where the switching movement was to be made and where the ten cars were to be detached from the train, it passed over the track rendered dangerous by the close proximity of tall canes negligently permitted to grow and remain there; that in the performance of his duties, the deceased was required to pass a signal to the engineer to indicate to him when to stop the train at the appropriate point so as to uncouple the first ten cars from the remainder of the train, and place them on the side track. The count then charged that the signal, which the deceased was thus required to pass to the engineer, ordinarily would have been given as the deceased was suspended from the right side and lead end of the sixth car ahead of the caboose, but that in this instance he was unable to follow that routine because of the tall canes which, as the train moved forward,

might scrape him off the side of the car; that he was thus required to cross from the lead end of the sixth car ahead of the caboose, a gondola car, in order to climb aboard a tank car immediately in front of said gondola car as from the side of the tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes, and as he could give said signal from the side of the tank car which would be visible to the engineer; that while thus crossing from the one car to the other, the train being in motion, the deceased was thereby caused to enter a place of much greater danger than that with which he would have been confronted had he been able to signal in the ordinary and usual fashion from the right end of the gondola car; and that while so acting under those circumstances of enlarged danger, he fell between the cars and was run over and killed.

In count 11 the plaintiff ascribes her husband's death to the negligent failure of defendant to provide an adequate number of competent fellow servants to work with him in the performance of their duties on the occasion of his death. That the defendant, as a co-worker of the deceased, furnished a brakeman named Skelly, who was so *in*competent and unskilled that he could not perform his appointed duties [fol. 28] as brakeman to signal the engineer when to stop the train preliminary to the intended switching movement, and that Reynolds, the deceased, was thus required to take over Skelly's job (thereby quitting a safer place of work and the performance of safer labors, in turn undertaken by defend*ant*'s conductor), and while thus performing the appointed duties of Skelly, who at that time was standing idle and doing no work whatsoever, Reynolds fell between the two cars of the moving train and was run over and killed.

The theory of liability asserted in count 12, is in substance, a combination of counts 10 and 11 stated in somewhat greater particularity. It relies upon defendant's negligent failure to furnish the deceased with a reasonably safe place to work, coupled with its negligent failure to provide an adequate number of competent fellow servants to work with him. It charged that defendant provided Skelly as one of the two brakemen on the train; that Skelly was incompetent, and that his duties had to be assumed by deceased, who ordinarily would have signaled the engineer as outlined in count 10, but that because of the danger from

the canes, and while performing Skelly's duties, and in attempting to cross from one car to another he fell between the cars and was killed.

The case of course is governed by the federal decisions, and as we have recently said in the case of *Atlanta, Birmingham and Coast R. R.* v. *Cary*, MS (6 Div. 663), "Under these decisions the Federal Employers' Liability Act does not make the employer the insurer of the safety of the employee while on duty. And the basis of the liability is the negligence of the employer, not the fact that injuries occur. Negligence must be 'in whole or in part' the cause of the injury."

A party claiming under the Act must in some adequate way establish negligence, and it must appear that such negligence was the proximate cause, in whole or in part, of the accident. *Tennant* v. *Peoria and Pekin Union Railway*, 321 U. S. 29, 88 L. ed. 520; *Tiller* v. *Atlantic Coast Line R. R.*, 318 U. S. 54, 87 L. ed. 610; *Atlanta, Birmingham and Coast R. R.* v. *Cary*, *supra*; *Alabama Great Southern R. R.* v. *Davis*, 246 Ala. 64, 18 So. 2d 737.

It is well understood that negligence may be averred in general terms, but if the pleader attempts to set out the *quo modo* of the negligence charged, then the facts alleged must in law constitute negligence, and no particular form is required in alleging the causal connection between the negligence charged and the injury. Where the acts of negligence are alleged, as a general rule it is sufficient to [fol. 29] make a direct general allegation that plaintiff's injury resulted from such negligent act or that such negligent act caused the injury. And in suits under the Federal Employers' Liability Act a general allegation that the injury resulted in whole or in part from such negligent act, or that such negligent act caused, in whole or in part, the injury is sufficient.

Also, "Where facts are alleged which show a causal connection between the alleged negligence and the injury, the complaint need not expressly state that such negligence was the proximate cause of the injury. It is sufficient that facts are alleged which, on a reasonable construction, create an inference or lead, with reasonable certainty, to the conclusion that the injury proximately resulted from the negligence charged, as where the complaint sets forth the facts constituting the negligent act or omission complained

of, and discloses in logical sequence the facts composing the secondary agency, force, or obstacle; if any, and details the resultant injury. But where the specific facts alleged to show that defendant's negligence was the proximate cause of plaintiff's injury are susceptible of different inferences, no inference in favor of the ultimate fact can be drawn in aid of the complaint." 45 Corpus Juris pp. 1195-6, section 668; *Birmingham, R. L. & P. Co.* v. *Hinton*, 141 Ala. 606, 37 So. 635; *Vulcan Revit Corp.* v. *Lawrence*, 214 Ala. 378, 108 So. 3; *Central of Georgia R. R.* v. *Bell*, 187 Ala. 541, 65 So. 835; *Birmingham R. L. & P. Co.* v. *Fisher*, 173 Ala. 623, 55 So. 995; *Louisville & Nashville R. R.* v. *Vanzant*, 158 Ala. 527, 48 So. 389.

The most that can be said of count 10 is that defendant's alleged negligent failure to furnish deceased with a reasonably safe place to work consisted in allowing tall canes to grow in close proximity to the railroad track, and which negligence caused plaintiff's intestate, Reynolds, to pursue a different course of conduct, and one alleged to be more hazardous from that ordinarily followed in signaling the engineer, and that while pursuing said different course of conduct he fell between the cars and was killed. Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader. As we have pointed out, the causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture. No where in count 10 is it made to appear what caused Reynolds to fall [fol. 30] between the cars. Climbing or going from one car to another on a moving freight train, in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous, the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care.—*Ellis* v. *Union Pacific R. R.*, 91 L. ed. 433. In order to state a cause of action, it must be made to appear by proper averments that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of

the attending circumstances. *Brady* v. *Southern Ry.*, 320 U. S. 476, 88 L. ed. 239; *Louisville & Nashville R. R.* v. *Maddox*, 236 Ala. 594, 183 So. 849. Count 10 does not meet these requirements.

As stated, count 11 is predicated upon defendant's failure to provide sufficient help. When such a failure results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers' Liability Act, but to permit recovery in such case it must be made to appear that such failure was the proximate cause of the accident. To recover, plaintiff is required to allege and prove not only that the railroad was negligent, but that the injury resulted proximately, in whole or in part, from that negligence.—Authorities, *supra*. See, also, *Deere* v. *Southern Pacific R. R.*, 123 Fed. 2d 438; *Marshall* v. *Chicago, etc., R. R.*, 131 Minn. 392, 155 N. W. 208; *Strunks* v. *Payne*, 184 N. C. 582; *Healey* v. *N. Y., O. & W. R. R.*, 79 Fed. 2d 542. Count 11 is subject to the same criticism as is count 10. The causal connection between the negligence complained of and the injury sustained is not made to appear, but is left to speculation and conjecture only.

Conceding that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of Reynolds. It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause, which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death.—Authorities *supra*.

Count 12 is but a combination of counts 10 and 11. In support of count 12 appellant cites *Union Pacific R. R.* v. [fol. 31] *Hadley*, 246 U. S. 330, 62 L. ed. 751, 3 S. C. 318, and *Blair* v. *Baltimore & Ohio R. R.*, 323 U. S. 600, 89 L. ed. 490, 65 S. C. 545. In the latter case, Mr. Justice Black, said: "The negligence of the employer may be determined by viewing its conduct as a whole. Union Pacific R. Co. v. Hadley, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely inter-

woven as to form a single pattern, and where each imparts character to the others." This principle has no application here. The defect in each count of the complaint is not in its failure to allege negligence, but failure to allege facts showing a causal connection between that negligence and the death of Reynolds. Count 12 is as defective in this regard as are counts 10 and 11.

The trial court properly sustained demurrer to all these counts.

Affirmed.

All the Justices concur.

[fol. 32] THE SUPREME COURT OF ALABAMA

6 Div. 643

MRS. MARIE REYNOLDS, Who Sues as Administratrix of the Estate of Hury O. Reynolds, Deceased,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation

JUDGMENT—June 24, 1948

Come the parties by attorneys and the record and matters therein assigned for error, being argued and submitted and duly examined and understood by this Court, it is considered that in the record and proceedings of the Circuit Court there is no error.

It Is, Therefore, Considered, Ordered And Adjudged that the judgment of the Circuit Court be in all things affirmed.

It Is Also Considered, Ordered And Adjudged that Mrs. Marie Reynolds, as administratrix of the Estate of Hury O. Reynolds, appellant, and J. K. Jackson, Erle Pettus and Al. G. Rives, sureties on the appeal bond, pay the cost of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemption under the laws of Alabama, let execution issue accordingly.

[fol. 33] SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING—Filed June 26, 1948

Now comes Mrs. Marie Reynolds, as Administratrix of the Estate of her deceased husband, plaintiff in the court below, and here the appellant, and respectfully moves the Court for a rehearing and that the judgment of the Court herein of to-wit, June 24, 1948, be set aside, and that a further judgment be rendered, reversing the judgment of the Court below, and in support thereof, the defendant respectfully prays that this Court will reconsider the briefs heretofore filed in her behalf, together with the following. (Brief herewith submitted).

Jackson, Rives & Pettus, by J. K. Jackson, Attorneys for Appellant.

[fol. 34] THE SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OVERRULING APPLICATION FOR REHEARING—June 30, 1948

It is ordered that the application for rehearing filed by the appellant on June 26, 1948, after being duly examined and considered by the Court, be and the same is hereby overruled.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 25, 1948

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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AUG 19 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A Corporation,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Attorney for the Petitioner.

JACKSON, RIVES & PETTUS,
Birmingham, Alabama,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A Corporation,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action under the Federal Employers Liability Act commenced by Mrs. Marie Reynolds (here the petitioner) suing as the Administratrix of the Estate of her late

husband, Hury O. Reynolds, Deceased, against the Atlantic Coast Line Railroad Company, to recover damages for his death. It was commenced in the Circuit Court of Jefferson County, Alabama (R. 1). (10th Judicial Circuit of Alabama.)

The complaint, as originally filed and as subsequently amended, consisted of twelve counts. The record was abridged in the Court below and for present purposes, the complaint consists of three counts, designated as Counts 10, 11 and 12 (R. 2-10 inc.). The trial court sustained the defendant's demurrer to the complaint (R. 21) when, conformably to the local practice[1] the plaintiff suffered a nonsuit with appeal to the Supreme Court of Alabama. That Court affirmed the judgment of the trial court in sustaining the demurrers to the complaint.

Reynolds, for whose death the action was commenced, was an employee of the Atlantic Coast Line Railroad Company. He was killed while in that company's service near Lake Harbor, Florida.

In Count 10, after the required averments of interstate commerce, the petitioner alleged that her husband had been killed on November 10, 1945, near Lake Harbor, Florida, while working as a member of the train crew of defendant's freight train Number 567 (R. 4).

The culpability ascribed was that the defendant negligently failed to furnish the deceased with a reasonably safe place to work (R. 4).

The count then went on to elaborate upon that alleged negligence and the manner wherein it caused the death of Mr. Reynolds, as follows: It alleged that the train consisted of an engine, tender, sixteen cars and a caboose; that the ten cars immediately back of the tender were to be cut out of

[1] Section 819 of Title 7 of the 1940 Code of Alabama is as follows: "If, from any ruling or decision of the court on the trial of a cause, either upon pleadings, admission or rejection of evidence, or upon charges to the jury, it may become necessary for the plaintiff to suffer a nonsuit, the facts, point, ruling or decision may be reserved for the decision of the appellate court by bill of exceptions or by appeal on the record as in other cases."

the train at Lake Harbor and left upon a siding there; that in connection with the intended switching movement, the deceased had taken his position at the lead end of the sixth car ahead of the caboose (and just back of the lead ten cars) where the train was then to be uncoupled (R. 5).

The count went on to charge that as said freight train approached the point where the switching movement was to be made and where the ten cars were to be detached from the train, it passed over track rendered dangerous by the close proximity of tall canes negligently permitted to grow and remain there. It said that in the performance of his duties the deceased was required to pass a signal to the engineer to indicate to him when to stop the train at the appropriate point so as to uncouple the first ten cars from the remainder of the train, and place them upon the side track (R. 4).

The count then charged that the signal which the deceased was thus required to pass to the engineer ordinarily would have been made as the deceased was suspended from the right side and lead end of the sixth car ahead of the caboose, but that in this instance he was unable to follow this routine because of the tall canes which, as the train moved forward, might scrape him off the side of the car. The count averred that he was thus required to cross over from the lead end of the sixth car ahead of the caboose—a gondola car—to a tank car ahead where his signals would be visible to the engineer and where the danger from the tall canes would be obviated (R. 4).

The count further charged that while thus crossing from one car to the other, the train being in motion, the deceased was thereby caused to enter a place of much greater danger than that with which he would have been confronted had he been able to signal in the ordinary and usual fashion from the right side of the front end of the gondola car; and that while so acting under these circumstances of enlarged danger, he fell between the cars and was run over and killed (R. 5).

In Count 11 liability is predicated upon an entirely different theory. Here the petitioner ascribed her husband's death to the negligent failure of the railroad to provide an adequate number of competent fellow servants to work with him in the performance of their duties on the occasion of his death (R. 5).

The count charged that the railroad, as a co-worker for the deceased, furnished a brakeman named Skelly, who was so incompetent and unskilled that he could not perform his appointed duties as brakeman to signal the engineer when to stop the train preliminary to the intended switching movement, and that Mr. Reynolds was thus required to take over Skelly's job (thereby quitting a safer place of work and the performance of safer labors, in turn undertaken by the conductor); and while thus performing the appointed duties of Skelly, who at that time was standing idle and doing no work whatsoever, Mr. Reynolds fell between two cars of the moving train and was run over and killed (R. 6).

The theory of liability asserted in Count 12 is in substance a combination of Counts 10 and 11, spelled out with somewhat greater particularity.

Count 12 seeks a recovery for the negligent failure to furnish the deceased with a reasonably safe place to work coupled with the negligent failure to provide an adequate number of competent fellow servants to work with him. (R. 7).

The count alleged that the railroad provided one, Skelly, as one of the two brakemen on the train (R. 8). It charged that Skelly was incompetent and unfit properly to perform and discharge the duties of footboard brakeman then assigned to him. These duties, the count alleged, had to be taken over by the deceased, who ordinarily would have performed them by signalling from the right side and front end of the sixth gondola car ahead of the caboose, but that because of the danger from the canes and while in the performance of Skelly's appointed duties, he had to cross

over from the gondola to a tank car immediately ahead of it, during which he fell between the two and was run over and killed.

The count concludes that being thus relieved of his own relatively safer work as head brakeman and directed to perform the more hazardous duties of footboard brakeman (made more dangerous by reason of the tall canes growing so close to the right of way), Reynolds was killed (R. 9).

The Court below affirmed the judgment of the trial court sustaining the demurrer to the petitioner's complaint in that neither of said three counts stated a cause of action, in that no proximate causation existed.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because:

(a) It has decided a federal question in a way probably in conflict with the applicable decisions of this Court. *Lillie v. Thompson* MS., 92 L.ed. 115; *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L.ed. 572; *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L.ed. 916; *Bailey v. Central Vermont Ry Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L.ed. 1444; *Tiller v. Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L.ed. 610.

The statutory authority under which such jurisdiction is invoked is 28 U. S. C. Section 347 (Judicial Code, Section 240, as amended).

The date of the judgment to be reviewed is June 26, 1948 (R. 29).

Question Presented

The sole question here presented is as follows: Could it be found from the facts alleged in either of the three counts of the complaint that the death of the plaintiff's intestate, at least in part, resulted from the respondent's negligence?

Reasons Relied on For Allowance of Writ

The Court below has decided a federal question in a way in conflict with decisions of this Court. Cases cited *ante* under "Jurisdictional Statement." The Court below judicially determined as a matter of law that the death of petitioner's intestate could not have been proximately caused, in part at least, by the actionable negligence of the respondent. Under the foregoing authorities—decisions of this Court—that determination was for the jury alone, and in usurping it the Court below transcended its function and its competence.

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this Court to the Supreme Court of Alabama, commanding said Court to certify and send to this Court the full and complete transcript of the record and of the proceedings of the said Supreme Court had in the case numbered and entitled on its docket No. 643, *Marie Reynolds, Admrx. v. Atlantic Coast Line Railroad Co.*, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Alabama be reversed by this Court; and for such further relief as to this Court may seem proper.

MRS. MARIE REYNOLDS, *as Administratrix of the Estate of Hury O. Reynolds, Deceased,*

Petitioner.

By J. KIRKMAN JACKSON,
818 Massey Building,
Birmingham, Alabama,
Her Attorney.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1948.

No. _____

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAIROAD COMPANY,
A Corporation,
Respondent and Appellee Below

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

OPINIONS OF COURTS BELOW

The opinion of the Supreme Court of Alabama (R. 22) is reported in _____ Ala. _____, _____ So. (2) _____; the trial court rendered its judgment sustaining the demurrer without opinion (R. 21).

JURISDICTION

This has already been set forth in the preceding Petition, and is here adopted and made a part of this case.

STATEMENT OF THE CASE

Under "Summary Statement of the Matter Involved" (petition ante) a sufficient statement is made fully to understand this case, and it is here adopted by reference.

THE SPECIFICATION OF ERRORS

The Court below erred in holding that from the facts alleged in the complaint (either in Count 10 or 11 or 12 thereof) the death of the plaintiff's intestate could not have resulted, at least in part, from the negligence of the respondent.

THE ARGUMENT

SUMMARY OF THE ARGUMENT

(a) An interstate railroad must use due care to furnish its employees a reasonably safe place to work and supply an adequate number of competent fellow servants to perform the appointed tasks, and if it fails therein and such failure "*in whole or in part*" causes injury, liability is established.

(b) To deprive railroad workers of the benefit of a jury trial even in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

(c) A railroad is bound to exercise reasonable care to prevent obstructions near its tracks which would be a source of danger to its servants.

(d) The negligence of the railroad may be determined by viewing its conduct as a whole, for "the total may be greater than the sum of its parts."

(e) Under the Federal Act what is the proximate cause of an injury is ordinarily for the jury, to be determined as a fact in view of all the circumstances attending it.

ARGUMENT

In these cases there are certain fundamental propositions so well established and accepted as to require neither the elaboration of argument nor the citation of authority. One of them is that the negligent failure of a railroad to furnish its employee with a reasonably safe place to work is actionable. Upon this theory we sought to frame Count 10 of the complaint.

In Count 10 of the complaint we charged that the defendant was liable because it negligently failed to furnish the plaintiff's intestate a reasonably safe place to work, thereby compelling him to adopt a perilous alternative in pursuing which he was fatally injured.

Equally well established is another theory of liability. It rests upon the negligent failure to provide an adequate number of competent fellow-servants properly to do the required work. It is made the basis of liability charged in Count 11.

Bearing in mind these two fundamental propositions (which we shall assume require no further comment), let us turn to the language of the Act itself, whereby the liability in these cases was ordained and established. (45 U. S. C. A. Sec. 51-56, incl.).

By the Act common carriers by railroad engaged in interstate commerce are made liable for injury or death resulting "in whole or in part" from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or deficiency in its cars, engines, etc.

We repeat that the Act creates a liability for injury or death resulting *in whole or in part* from such designated causes. So, the authoritative Federal pronouncements have literally construed it.

As recently as last February in *Ellis v. Union Pacific R. R. Co.*, 329 U. S. 649, after referring to negligence as being the basis of liability under the Act, the Court declared:

> "... and that negligence must be *'in whole or in part'* the cause of the injury." [Emphasis supplied.]

To disregard the phrase "in part"

"would be emptying the statute of its meaning ..." per Holmes J. in *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330, 62 L.ed. 751, 38 S. Ct. 318.

What was the effect of the judgment of the Court below

in sustaining the demurrer to the complaint? Simply stated, the effect was to deprive the plaintiff of a jury trial.[2]

That, we submit, was error. Even in close or doubtful cases it would have been improper, for it would take away a goodly portion of the relief which Congress, in the Federal Employers' Liability Act, has ordained must be given to railroad employees and their families.

In *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L.ed. 1444, 63 S. Ct. 1062, Mr. Justice Douglas said:

> "To deprive these workers (i.e., railroad workers) of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

The foregoing statement of Mr. Justice Douglas was approved and quoted verbatim in *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. ed. 490, 65 S. Ct. 545, a later decision written by Mr. Justice Black.

Depriving the plaintiff of the opportunity of having her case heard and determined by a jury was a grave infringement of her rights established by the Act.

There is another legal principle also applicable to these

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[2] Of course the plaintiff's complaint could have been framed in such general terms as to have been good against any demurrer. General allegations of negligence are permissible in Alabama. It is not necessary to allege the *quo modo*. But a verdict rendered on such a complaint would, we apprehend, have certainly been set aside, if we attribute any degree of consistency to the Supreme Court of Alabama. Suppose, however, we had followed this course, alleging negligence generally and not attempting to set forth the *quo modo*, and the jury rendered a verdict for the plaintiff. If the petitioner escaped having her judgment set aside on the railroad's motion for a new trial, the State Supreme Court would have reversed it for the asserted error of not directing a verdict for the defendant. Under Alabama practice, however (as distinguished from some of her sister states) such a judgment of reversal, though fatal, would not be a *final judgment* subject to review here. We would have been required to go back to the Trial Court, go through an empty trial, permit the trial judge to direct a verdict for the railroad, perfect an appeal to the State Supreme Court, allow the case there to be affirmed, and then petition this Court. Only then, if this alternative had been pursued, would review in this Court have been possible. Compare *Davis v. Alabama Great Southern R. R. Co.*, 246 Ala. 64 (Cert. den. 324 U. S. 846).

Therefore we elected not to follow this course but to frame a complaint which would set forth in detail what could be proved by the plaintiff's evidence. Thus we are able to seek a review here, without all the interminable backing and filling which we have described.

cases (as distinguished from the ordinary run-of-mine damage suit). Baldly stated and involving an apparent paradox, it is that "the total of the negligence in a case under the Federal Employers Liability Act may be greater than the sum of its parts." Stated in other language, it is that the negligence of the employer may be determined by viewing its conduct as a whole, especially where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others. Upon the foundation of this principle we sought to frame Count 12 of the plaintiff's complaint.

So far as we have been able to ascertain, this rule was first enunciated by Mr. Justice Holmes in *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330, 62. L.ed. 751, 38 S. Ct. 318. Many different circumstances entered into the question of the negligence *vel non* of the defendant railroad. Of them the Court declared:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. *But the whole may be greater than the sum of its parts*, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect. Upon that point there can be no question. We are not left to the mere happening of the accident. There were block signals working on the road that gave automatic warning of danger to 501, and which it was negligent to pass, seen or unseen, as the engine crew knew where they were and that another train was not far ahead. There was a snowstorm raging which the jury might have found to have been of unprecedented violence, and it was open to them to find, in view of circumstances unnecessary to detail, that the despatcher ought not to have sent out extra 510 West, as he did, and that he was grossly wrong in

> not allowing 504 to come in, and in not leaving it to 501 to bring back the disabled engine. It might have been found improper to leave the conductor of 501 at Potter. It is superfluous to say more upon this point." [Emphasis supplied.]

* * * *

As we understand the judgment of the Court below it is premised on a supposed absence of proximate causation between the injury suffered and the negligence charged.

The recent decisions of this Court lay down the rule that where negligence is proven in cases under the Federal Employers Liability Act, the question of whether it proximately causes the injury suffered is for the resolution of the jury alone.

Applying that principle to the case at bar if the complaint or any count thereof sufficiently charged negligence (and we must accept the allegations of the three counts as true in the present posture of this case) whether there was a required causal connection of the injury must be for the jury, and the trial court transcended its function (as did the State Supreme Court) in determining as a matter of law that no such proximate causation could exist.

Since the trial of this case in the *nisi prius* Court, this Court has put out *Lillie v. Thompson*, MS. Advance Sheets No. 3, Vol. 92, L.ed. 115. That case, as did this one, went off on the pleadings. The District Court sustained the defendant's motion to dismiss the suit because the complaint failed to state a cause of action. The Circuit Court of Appeals for the Sixth Circuit affirmed that judgment. This Court granted certiorari and in a per curiam decision stated the sole question

> "could it be found from the facts alleged in the complaint, as supplemented by any unconverted allegations by the respondent, that petitioner's injuries resulted at least in part from the respondent's negligence?".

In the *Lillie* case, as in the case at bar, the preoccupation of the District Court and the Court of Appeals was with the question of proximate causation between the injury alleged and the negligence charged.

The Court will remember the facts in that case. The petitioner, a young woman, worked alone during the nighttime in a one-story frame building situated in an isolated part of the railroad yards of the defendant in Memphis. The complaint charged that the railroad had reason to know that the yards were frequented by footpads and that it nevertheless failed to use due precaution to protect the peitioner.

Late one night, while at work, a stranger assaulted her. It was conceded that he was not an employee of the respondent and that the attack was criminal. This Court nevertheless concluded that the allegations of the complaint, if supported by evidence, warranted the submission of the case to the jury. This Court said that the danger was foreseeable and that therefore it could not be said that as a matter of law the pettitioner's injury did not result, *at least in part*, from the negligence of the respondent.

In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 329, this Court declared that the jury draws the ultimate conclusion as to the facts, and

> "That conclusion, *whether it relates to negligence, causation or any other factual matter*, cannot be ignored." [Emphasis supplied.]

In *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, Mr. Justice Douglas said:

> "Reasonable care *and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.*" [Emphasis supplied.]

There are many other decisions of this and other federal courts to the same effect.

We will not pause further to quote from or analyze any of them except *O'Connor v. Chicago M. & St. P. R. R. Co.*, 158 N. W. 343, 163 Wisc. 653, here affirmed in 248 U. S. 536, 63 L.ed. 408, 39 S. Ct. 21. We refer to it because it deals not only with proximate causation, but also involves an obstruction near the tracks of the railroad.

In the *O'Connor* case suit was brought for the death of a trainman killed in a derailment. The complainant alleged that the railroad had negligently allowed a tree to remain so near the right of way that it was liable to be blown down by storms such as were likely to occur. It was blown down, not by an ordinary storm, but one of very unusual severity. It was judicially determined that proximate causation existed.

In Count 10 of the petitioner's complaint we urged that the railroad was liable because it negligently failed to furnish the deceased with a reasonably safe place to work, thereby compelling him to adopt a more perilous alternative in the pursuit of which he met his death.

In negligently failing to remove the tall canes and so furnish him with a safe place to work and do the job he was supposed to do, viz., signal the engineer while suspended from the side of the gondola and thus stop it at the proper place, it was certainly foreseeable that Reynolds would do what he actually did, namely, undertake, while the train was in motion, to move from the front end of the gondola car to the car ahead—a tank car—where, as alleged in the complaint, he could give signals visible to the engineer, and at the same time avoid being scraped off the side of the car by the tall canes.

We are arguing for no novel variation of the principle

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[3]Cf. *Washington R. Co. v. Scala*, 244 U. S. 630, 61 L.ed. 1360, 37 S. Ct. 654 (Allowing a telegraph pole to remain too close to track, causing death of plaintiff's intestate).

of proximate causation either in Count 10 or in any other count of the complaint.

The principle upon which we rely was enunciated by Lord Ellenborough, C. J. in *Jones v. Boyce*, 1 Stark 493, 171 Reprint 540, a hundred years ago. He said:

> "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

It was a customary part of Reynolds' job, as counsel will no doubt argue, at times to pass from car to car, crawling over the top of one to the top of another, or from the end sill of one to the top of another, making his way as best he could all the while the train being in motion. So it was, as we freely concede. But that does not minimize the validity of the further observation that in performing that phase of his work he was not as safe from injury as when suspended from the side of a slowly moving gondola car. In the latter position, if he slipped and fell (taking into account the car's overhang outside the rail), it would have been an unusual accident indeed if he were run over by the wheels. At worst he could have anticipated a scarred and bruised body; but if he slipped and fell to the ground while crossing from one car to another, as here alleged, it was inevitable that he fall to his death.

That, simply stated, was the difference in the two alternatives.

One of them could have been safely pursued, absent the tall canes. Being there, they left him only a Hobson's choice of the dangerous alternative. He made that choice and paid with his life.

Not only was it foreseeable that being unable to signal the engineer from the side of the gondola car he would attempt to crawl to the side of the car ahead—we repeat not only was that foreseeable—but as we view it, it was inevitable. But whether inevitable or merely foreseeable, it

means proximate causation. The court of first instance erred in sustaining the demurrer as did the Court below in affirming that judgment.

The same argument as to the proximate cause is applicable to Count II of the petitioner's complaint.

If we assume that Skelly, whose job Reynolds was attempting to perform when killed, was so incompetent that he could not do it, certainly it was foreseeable, if it were not inevitable, that the job would be delegated to someone else. Reynolds, the other brakeman got that job—a dangerous chore indeed as it so tragically proved.

How then can it be denied that the act of the railroad, in putting Skelly in this train crew, did not *in part at least* cause the death of the petitioner's husband.

It is respectfully submitted that the *Lillie*, the *Tennant*, and the *Bailey cases* are conclusive of the question and it is thus unnecessary to pursue the sometimes fine-spun rationale of proximate causation.

THE CONCLUSION

The three counts of the petitioner's complaint here under consideration, may perhaps be justifiably criticized for being somewhat prolix. If so, we say by way of extenuation that this infirmity is attributable to our purpose to set forth, if possible, by way of allegation, the ingredients of a complaint *in the light of what could be proven by the available evidence in the case*. Thus, as pointed out in the footnote above (Footnote 2), it could be judicially determined without an interminable process, wasteful alike to the Court and the parties, whether the petitioner has or has not a meritorious cause against this railroad for the death of her husband.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Attorney for Petitioner.

Appendix

In *L. & N. R. R. Co. v. Maddox*, 236 Ala. 594, 183 So. 849, (1938)—an ordinary damage suit—the Court below was apparently willing to extend proximate causation considerably further than would here be required. While that decision is of no controlling moment here, it may be of some academic interest.

The plaintiff's intestate bought an excursion ticket for a trip over the defendant's railroad from Birmingham to Mobile. About the same time her excursion train was scheduled to depart, another train of the defendant—the Pan American—also going to Mobile, left Birmingham.

By mistake she was permitted to board it. En route to Montgomery, an intermediate point, that mistake was discovered and the plaintiff's intestate was required to leave the Pan American at Montgomery and there await the excursion train. Upon its arrival in Montgomery, in going from the waiting room in the station, the plaintiff's intestate fell down three steps and was injured and died. There was nothing whatever wrong with the steps—either in their structure or because of some foreign substance being upon them.

The Supreme Court of Alabama concluded there was proximate causation between the negligence of allowing the plaintiff's intestate to board the wrong train in Birmingham and the injury which she sustained in falling down the steps in the railroad station in Montgomery. It viewed the death of the plaintiff's intestate as the foreseeable consequence of the initial negligence in Birmingham. It said:

> "[10] It is reasonably to be inferred that in the case at bar Mrs. Montgomery would not have been in appellant's waiting room at Montgomery to again board a train to Mobile if she had not been placed upon or permitted to board this section of defendant's train in question at Birmingham by the mistake of appellant's

agent within the line and scope of his duty. That is to say, the act of appellant's agent in misreading the ticket in Birmingham and permitting her to board the wrong section is so closely related in cause and effect to the fall and injury of decedent, while she was being required to make the change of trains in Montgomery, as to be in law the proximate cause thereof."

The *Maddox* case, if it please the Court, was an ordinary damage suit. It was decided without any statutory aid such as F. E. L. A. Nevertheless proximate causation was held to exist.

It would seem to us that the case at bar is much clearer. There the initial negligence of the defendant caused the deceased to pursue an alternative course of conduct but that alternative was not inherently perilous. Remaining briefly in the station waiting room in Montgomery and then leaving it to board another train was certainly not an implicitly dangerous activity even for an elderly woman.

The reach of the *Maddox* case is certainly broader than the case at bar where the alternative course to which the deceased trainman was driven was inherently dangerous.

Petitioner's Reply Brief to Supplemental Brief & Argum't of Respondent

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NO. 234

234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,

Petitioner and Appellant Below,

versus

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation,

Respondent and Appellee Below.

PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

FOREWORD

In a supplemental brief, of which, on New Year's Eve, we were served with an incomplete, typewritten copy, counsel for the respondent undertakes to inject a theory heretofore novel in this case as a reason for affirming the judgment of the court below. We ask permission of the court to file a reply in this form with the understanding that we will replace it with printed copies as soon as possible.

PETITIONER'S REPLY BRIEF TO SUPPLEMENTAL BRIEF AND ARGUMENT OF RESPONDENT

In its supplemental brief the respondent urges that the judgment of the court below should be affirmed because it decides a procedural question (i.e., the sufficiency of

the counts in the declaration—pleading) and is therefore governed by Alabama law and not by the federal decisions; or in the alternative it is said that the decision is partly of adjective (and local) and partly of substantive law and therefore not here reviewable. (*Herb v. Pitcairn*, 324 U. S. 117).

That is simply not so.

The opinion of the Supreme Court of Alabama clearly demonstrates the contrary. The original brief of the respondent disclaims any such suggestion.

The decision of this case was based on a supposed absence of proximate causation between the negligence charged and the death of the plaintiff's intestate. An examination of the opinion below incontestably shows this to be true.

As we have said, there were three counts in the plaintiff's declaration (Counts 10, 11 and 12).

As to Count 10, the Supreme Court of Alabama, in adjudging it to fail to state a cause of action, and thus sanction a jury verdict, declared (R. 26):

> "As we have poinied out *causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture.* Nowhere in Count 10 is it made to appear what caused Reynolds to fall between the cars. Climbing on, going from one car to another on a moving freight train in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care." (Emphasis supplied.)

So much for Count 10.

As for Count 11, the opinion below (R. 27) observed:

> "Count 11 is subject to the same criticism as is Count 10. *The casual connection between the negligence com-*

plained of and the injuries sustained is not made to appear but is left to speculation and conjecture only." (Emphasis supplied.)

So much for Count 11.

As to Count 12, the Supreme Court of Alabama, in its opinion (R. 27-28) said:

"Count 12 is but a combination of Counts 10 and 11 * * * *The defect in each count of the complaint is not its failure to allege negligence but failure to allege facts showing a casual connection between the negligence and the death of Reynolds.* Count 12 is as defective in this regard as are Counts 10 and 11." (Emphasis supplied.)

Proximate cause, vel non, is the nub of this lawsuit.

That this supposed infirmity represents the true rationale of the decision of the court below (thus making the case here reviewable), and that the court below was not, in truth, concerned with a decision of any procedural matter governed by local law, is further made apparent in the original brief of counsel for the respondent. On page 8 of that brief, counsel states:

"In order to recover in this case it is necessary that petitioner allege and prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident."

And again (Op. Brief, page 8):

"It is elemental in the essential matter of causation, the alleged negligence of the carrier must be a link in an unbroken chain of reasonably foreseen events."

And in summary, counsel for the respondent thus fairly states his real contentions (Op. Brief, page 6):

"The Respondent's demurrers (R. 10 to 20, inc.) challenge the sufficiency of the essential averments of each of the Counts to show the existence of negligence on the part of Respondent or the actual breach of any legal duty owed the deceased (Grounds 1 to 3, 10, 12 to

14, 19, 21, 22, 32, 34, 35, 36, 38 to 41, 44, 46 to 55, 57 to 77, 79 to 81," and also as failing to show any such negligence as the proximate cause, in whole or in part, of the death of the deceased. (Grounds 4, 5; 7, 14, 23 to 30, 32 to 35, 38 to 42, 44, 45, 55, 56, 62 to 65, 68, 69.)"

Thus counsel states the three problems sincerely raised by the demurrer:

(1) Absence of essential averments to show negligence,
(2) No breach of legal duty,
(3) Lack of proximate cause.

The court below (as did the trial court) overruled counsel in his first two contentions, and sustained him in his third. The court said (and we repeat):

> "The defect in each count is not its failure to allege negligence but failure to allege facts showing a causal connection, etc." (R. 27-28.)

What we are trying to say is that the crux of this case is the solution of the sole question of whether, from the facts alleged, (on demurrer conceded to be true) there was a causal connection between the negligence charged and Reynolds' death.

That was the question in the trial court.

That was the question in the Supreme Court of Alabama.

And that was the question presented here and in the original brief submitted by counsel for the respondent.

The notion that the case went off on a procedural question or that such is here involved is, as we submit, entirely by way of afterthought.

* * *

But meeting that contention head-on, our answer is that we are not here concerned with any question of procedure at all. We have here a question of the very essence of the substantive law of the case.

As counsel observes, we attempted to aver in detail all of the facts that the available evidence could show. So we said in the footnote on page 14 of our original brief for the reasons there set forth.

Such was our privilege.

These statements in detail in the three counts of our complaint, in the present posture of this law suit, constitute the facts upon which the decision here should rest.

The trial court held these facts were not enough and sustained the respondent's demurrer to their legal sufficiency. The Supreme Court of Alabama said the trial court was right because there was no proximate causation. Thereby these two courts undertook to decide and there was decided, not a procedural question at all, but on the contrary, one of substance and therefore governed by the decisions of this Court. This is true for the reason that in sustaining the demurrer to the three counts of the complaint the courts *undertook to evaluate the quantum of the petitioner's evidence* which, as this Court has many times declared, is entirely and solely a federal question.

We will pause to refer only to one decision of the many of this court on that point:

Garrett v. Moore-McCormick, Inc., 317 U. S. 239, 63 S. Ct. 246.

In that case Garrett, a seaman for the shipping company, brought suit under the Jones Act, claiming he was hurt by a hatch cover which allegedly fell on him because of the respondent's negligence. Among other defenses the respondent pleaded a release. The Supreme Court of Pennsylvania, affirming a judgment for the defendant, while conceding that it was obligated to apply the federal law creating the right of action in the same sense that it would have been applied in the federal courts, decided that the burden of proof, as to the validity, vel non, of the release did not affect the substantive rights of parties, but was

merely procedural and therefore controlled by the state law. This Court disagreed and reversed that judgment, saying:

> "This court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules' * * *. *This uniformity requirement extends to the type of proof necessary for judgment.*" (Emphasis supplied.)

Simply put, there is here a statement of facts upon which the plaintiff relies to recover, tendered by her declaration in the trial court and by the demurrer of the respondent admitted to be true. Does that statement include a case sufficient to submit to a jury?

That question must be answered by applying the yardstick of this Court's decisions. It is not to be decided by the application of any "local views of common law rules." Nor is it meet that counsel, in their efforts to force the application of local rules, should indulge in an exercise in semantics, however ingenious, of attempting to ascribe procedural aspects to fundamental, legal questions of substance.

* * *

ON THE PROBLEM OF PROXIMATE CAUSATION

Since we filed our original brief in support of the petition for the writ in this case, we have learned of

Keys v. Pennsylvania R. Co., 104 F. (2) 663, (C. C. A. 2),

We deem that case of sufficient importance to justify its extended discussion, both in the Court of Appeals and here.

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[1] This rule is apparently well understood by the Court below. Compare *Zavatz v. Southern Railway Co.*, 248 Ala. 137, 26 So. (2) 545, and *L. & C. R. Co. v. Johnston*, 205 Ala. 1, 87 So. 866. Probably the Court below, cognizant of the rule as these two cases would indicate, erred in the case at bar because failing properly to conceive the effect of the several recent decisions of this Court, referred to in our original brief.

The plaintiff, as administratrix of the estate of one Keys, a section foreman in the employ of the defendant railroad, recovered judgment in the District Court for his death occurring while he was attempting to put out a brush fire near a shelter station called Bluemont, Maryland, on defendant's main line from York, Pennsylvania, to Baltimore, Maryland. The jury returned a verdict for the plaintiff on which judgment was rendered. The plaintiff's evidence indicated that a brush fire had been negligently started by sparks from one of the defendant's trains and the deceased, in attempting to extinguish it, had died from suffocation due to the smoke and fumes. The railroad contended that the deceased died from cerebral hemorrhage and more importantly that in attempting to put out the fire the plaintiff was merely doing his customary and usual work and that this particular brush fire was no more dangerous than such fires usually are. The Circuit Court of Appeals put aside the question of negligence and rested its decision on the ground that

> "There could be no recovery because that inherent danger in work the deceased had undertaken to perform was not enhanced by any negligence of the defendant after the fire had started."

For which reason the judgment of the District Court was reversed.

The Circuit Court of Appeals further observed:

> "His voluntary exposure of himself to such dangers as did confront him at the time he died involved only the risk of known dangers which were ordinarily incident to his employment."

This Court granted certiorari (308 U. S. 103), and in a *per curiam* decision (308 U. S. 385) reversed the judgment of the Circuit Court of Appeals and affirmed that of the District Court upon the ground

"that the question of assumption of risk was properly submitted to the jury."

We are persuaded that the Keys case is, on principle, completely analogous to the case at bar. In that case (according to plaintiff's evidence), a brush fire was negligently started by an engine of the defendant. This caused the deceased section-hand to act and take steps to put it out. In doing so, he undertook a chore of everyday occurrence in his regular job.

In the case at bar, as alleged in Count 10 of the complaint, Reynolds attempted to cross from the lead end of the gondola to the rear end of the tank car. Crossing from one car to another, the train being in motion, was part of his job. As the Court below says while this was dangerous, it was what he was hired to do (R. 26), for which reason it argues there was no proximate causation.

We respectfully submit that the Keys case is a direct authority to the contrary. It is doubly an authority since the 1939 amendment to the Federal Employers Liability Act with its abolition of the defense of assumption of risk.

There is another decision which we would like to call to the attention of the Court. It is

Penn v. Chicago & N. W. R. R. Co., 163 F. (2) 995 (C. C. A. 7).

In the Penn case, the Court of Appeals reversed a judgment for the plaintiff obtained in the District Court under the Safety Appliance Act. The plaintiff's complaint charged that the defendant negligently equipped a railroad car with a defective coupling which would not uncouple with a pin lifter, contrary to the provisions of the Act.

Penn, the plaintiff, was engaged in classifying cars. He had to run alongside a train moving six or eight miles an hour for fifteen or twenty feet whenever it was necessary to uncouple. He attempted first to uncouple the particular

car while hanging on the side of the next car (thus saving some steps) and working the uncoupling lever from that position. He failed. He then dismounted; running alongside the moving train for two or three steps and working the lever. This time he succeeded, but at that instant, his foot caught in a space between the switch rod and the switch ties at a switch stand and he was hurt. In a decision rendered by this Court on October 25, 1948, the judgment of the Circuit Court of Appeals was reversed (93 L. ed. 37).

While the opinion of the Court of Appeals does not say so, it occurs to us that here most importantly was involved a question of proximate causation. Conceding (which was denied) that there was some defect in the coupling apparatus, the plaintiff was not required to go between the cars. All he did was run alongside the slowly moving train where he succeeded in uncoupling the car. That was the job he was appointed to perform. He stepped in a space between the switch rod and the switch ties. As we view it, the question of proximate causation there was no more difficult than in the case at bar.

And finally on this proposition of proximate causation, we would like to call to the attention of the Court the observations in the "Restatement" (Volume 2, Section 303) which we herewith quote:

> "An act is negligent if the actor intends it to affect, or realizes or should realize that it is likely to affect, the conduct of another, a third person or an animal in such a manner as to create an unreasonable risk of harm to the other.
>
> "When actor does not intend to cause particular conduct. The actor may not intend the third person to act in any particular way. If so, the actor's negligence lies in the fact that he does or should realize that his conduct may cause the third person so to act, or in the further likelihood that the third person may do the act in a careless manner. In such case, the actor's negligence depends upon the extent to which he is required to realize and take into account the tendency of mankind or of the

particular person to act improperly (see § 302). Where, as in the situations dealt with in this Section, the third person's act is done in response to the stimulus of the situation created by the defendant's conduct, there is a tendency to require the actor to realize the tendency of human beings to act improperly to a greater extent than where he creates a situation, the danger of which lies in the chance of impropriety on the part of a third person in doing an act which is not so influenced by the situation created by the actor."

THE ECHENRODE CASE

This Court on November 15, 1949, put out *Echenrode v. Penna. R. R. Co.* (December 1st issue, Supreme Court Reporter Advance Sheets). Because counsel for the respondent apparently derived considerable satisfaction from it we will make certain observations concerning it.

There are several important aspects of the *Echenrode* decision sharply distinguishing it from the case at bar. Some of them are referred to in the decision of Judge Goodrich, author of opinion in the Court of Appeals. In the first place, Echenrode left a place of safety in the caboose. He had no duties to perform. There was, as the majority of the court viewed it, no obligation on the part of any member of the train crew to look out for him. There was nothing in the deceased's conduct to give the engineer any notice that there was danger involved in the situation. As Judge Goodrich observed (p. 1,000) the sole point upon which he decided was a complete *absence of any negligence whatsoever on the part of the railroad train crew or any member thereof.*

In the case at bar, on the other hand, Reynolds was in the performance of his duties. He had to go where he did go in order to carry out and perform his job. There was negligence both admitted by the demurrer and conceded in the opinion of the Court below. There was negligence under either theory and under either count. The question

here is whether that negligence caused him to be fatally injured.

It is respectfully submitted that the law of the Echenrode decision does not reach the problem.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A Corporation,
Respondent and Appellee Below

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

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vs.

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A Corporation,
Respondent and Appellee Below

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported in 36 So. 2d 102 (Adv. op.) and is set out in the record herein (R-22).

STATEMENT OF THE CASE

This proceeding challenges the soundness of the judgment (R-28, 29) and opinion (R-22 to 28, inc.) of the Supreme Court of Alabama in affirming the judgment of the trial court (R-20-21) which sustained apt demurrers to the Petitioner's Complaint in her suit under the provisions of the Federal Employers Liability Act (Title 45 U.S.C.A. Sec. 51) for the alleged death of her intestate. The complaint here presented consisted of three counts, numbered Ten, Eleven and Twelve. There is no question concerning the sufficiency of the allegations of the complaint that the Petitioner's intestate was an employee of the Respondent and that his employment was in interstate commerce at the time of his death. Since the Petitioner elected not to frame her Complaint so as to charge culpable negligence in permissive general terms, in keeping with general practice, but deliberately chose to allege the particular facts in as full detail as the available evidence would support (Petitioner's Petition and Brief, p. 11 and 17) we believe it appropriate to set out these essential allegations as made.

Count Ten of the Complaint (R-2 to 5, inc.) undertook to predicate liability upon the following particular allegations relative to the place of work furnished the deceased (R-3 to 5, inc.):

> "***the defendant negligently failed to furnish the said Hury O. Reynolds with a reasonably safe place to work, in that the defendant or agents, servants or employees of the defendant, while acting within the line and scope of their employment by the defendant, negligently allowed tall canes to grow and remain in very close proximity to the railroad track over which the defendant's said freight train was being operated and upon which the said Hury O. Reynolds was riding in the performance of his duties for the defendant at said time and place, and the plaintiff avers that said railroad train

of the defendant consisted of the engine and tender, approximately sixteen (16) freight cars and the caboose of which the ten (10) cars immediately in the rear of the engine and tender were to be detached from the train and placed upon a side track at Lake Harbor, Florida and that the said Hury O. Reynolds in and about said switching operations was required to act and did begin to act as the socalled footboard brakeman and as such brakeman, shortly before arriving at the point where he was injured and killed, he had taken his position on the lead end of the sixth (6th car) from the caboose where it was intended to uncouple said train and thereafter place the several cars ahead of the car upon which the said Hury O. Reynolds was riding at said time and place upon said side track as aforesaid and upon nearing the switch leading into said side track, where said ten (10) cars were to be spotted, the said Hury O. Reynolds was required to pass a signal to the engineer so as to inform the engineer as to the point where said train should be stopped to be uncoupled as aforesaid and in order to pass said signal to the engineer so that said signal would be visible to the engineer, the said Hury O. Reynolds was required to give said signal while suspended from engineer's side of said moving train, and the plaintiff avers that if the defendant had not negligently failed to provide the said Reynolds with a reasonably safe place to work as aforesaid, the said Reynolds would have descended the engineer's side of the gondola car upon which the said Reynolds was then and there riding and would have given said signal to the engineer from the side of said gondola car, but because of the close proximity of said tall canes to the railroad track at said time and place, his said signal to the engineer, if given from the side of the gondola car, would not have been visible to the engineer and because of the danger of being struck and scraped off the side of said gondola car by said tall canes while suspended from the side of said gondola car as said gondola car passed the place where said tall canes were then and there growing, the said Reynolds was caused to cross over the front end of said gondola car in order to climb aboard

a tank car immediately in front of said gondola car as from the side of said tank car he would be above the top of said tall canes so that said canes would not strike him as the moving train passed said canes and as he could give said signal from the side of said tank car which would be visible to the engineer, and the plaintiff avers that in having to cross from said gondola car to said tank car in order both to avoid being struck by the tall canes and to give a signal visible to the engineer as aforesaid, the said Reynolds was thereby caused to place himself in a place of much greater danger than he otherwise would have been required to do in the performance of his duties at said time and place, had the defendant not negligently failed to provide him with a reasonably safe place to work in negligently allowing said tall canes to be and remain in close proximity to said railroad track at said place. And the plaintiff avers that while the said Reynolds was in said place of much greater danger as aforesaid and between the gondola car and said tank car of said moving train he fell from said train and was run over by said train and was injured so that he died."

There are otherwise no averments of facts undertaking to show that the place at which the deceased was performing his duties in going from one car to the other was not a reasonably safe place to accomplish the duties in which he was engaged, nor that he was ordered or directed to pursue that course, nor any averment showing how or why the deceased fell from the car while allegedly undertaking to proceed to the next car ahead.

Count Eleven of the Complaint (R-5 to 7, inc.) undertook to predicate liability upon the following particular allegations relative to the fellow employee of the deceased (R-6):

"***the defendant negligently failed to provide an adequate number of competent fellow servants to work with the said Reynolds in the performance of the duties

required of him and his fellow servants at said time and place in this, that the defendant furnished as a brakeman to work with Reynolds on said train at said time and place one W. E. Skelly who the plaintiff avers was incompetent and unskilled as a railroad brakeman and who had he been a competent and skilled railroad brakeman at said time and place would have been required, in the performance of his duties with the defendant, as the train upon which the said Reynolds and the said Skelly were then and there riding neared the switch at the junction of the main line of the Florida-East Coast Railroad Company with the Florida-East Coast exchange track located at Lake Harbor, to give a signal which would be visible to the engineer at the head of said train so as to inform the engineer as to the point where said train should be stopped preparatory to engaging in a switching movement and the plaintiff avers that because the said Skelly was incompetent and incapable of performing his said required duties as a railroad brakeman at said time and place the said Reynolds as the only other brakeman on said train at said time and place was required to undertake the performance of the duties of the said Skelly as a railroad brakeman at said time and place the said Reynolds being thereby caused to quit a much safer place of work and the performance of much safer duties which were assumed by the conductor on said train and the plaintiff avers that while the said Reynolds was engaged in the performance of the duties of the said Skelly and the conductor was engaged in the performance of the duties of the said Reynolds and while the said Skelly was standing idly by and not engaged in the performance of any duties whatsoever, the said Reynolds fell between two cars of said moving train and was run over by said train and was injured so that he died on said date.***"

There are otherwise no allegations in the count undertaking to show that the Respondent negligently failed in any way to furnish either the deceased or his alleged fellow employee Skelly a reasonably safe place to work, nor that any unskilled act of Skelly caused the deceased to fall, nor how

Skelly's alleged incompetence caused or proximately contributed to the fall.

Count Twelve (R-7 to 10 inc.) merely combines the averments of the foregoing Counts Ten and Eleven. In short, it alleges that one of the members of the crew was allegedly incompetent and performed no duties and that the deceased, in undertaking to perform the duties of the other crewman, left a "much safer place of work" and the performance of "much safer duties"; that because of the alleged growth of tall canes in close proximity to the railroad track (a track of the Florida East Coast Railroad Company on which the Respondent's train was at the time operating (R-6)) the deceased allegedly could not effectively signal the engineer from the side of the gondola car and therefore adopted an alternate method of performing his alleged duty, to signal the engineer, by proceeding to the tank car next ahead of the gondola car; and then simply that in the course of so moving to the car next ahead the deceased fell from the train. There are no other averments therein of facts concerning how the deceased fell from the train nor that the alternate place or route he chose to perform his duties was not a reasonably safe place or method.

The Respondent's demurrers (R-10 to 20, inc.) challenge the sufficiency of the essential averments of each of the Counts to show the existence of negligence on the part of Respondent or the actual breach of any legal duty owed the deceased (Grounds 1 to 3, 10, 12 to 14, 19, 21, 22, 32, 34, 35, 36, 38 to 41, 44, 46 to 55, 57 to 77, 79 to 81) and also as failing to show any such negligence as the proximate cause, in whole or in part, of the death of the deceased (Grounds 4, 5, 7, 11, 23 to 30, 32 to 35, 38 to 42, 44, 45, 55, 56, 62 to 65, 68, 69).

THE ARGUMENT

SUMMARY OF THE ARGUMENT

1. In asserting a claim for recovery under the Federal Employers' Liability Act the plaintiff must allege and establish probative facts which reasonably show that the defendant was negligent *and* that that negligence was the proximate cause, in whole or in part, of the accident.

2. When the essential facts are undisputed or, if disputed, when the evidence is concluded, whether the probative facts and reasonable inferences therefrom meet the tests of liability is a question of law to be resolved by the court before there is anything to be submitted to a jury.

3. Inferences, whether relating to breach of duty or proximate causation, may not be built upon inferences but only upon facts; and mere speculation will not be allowed to do duty for the essential probative facts.

4. Since the Congress has not yet required the railroad industry to bear the financial burden of every accident the courts will honestly apply the prescribed negligence test and not pretend there is negligence when it does not exist.

ARGUMENT

The issues here involve the legal sufficiency of allegations of the Complaint—not whether conflicting evidence was sufficient to warrant submission to a jury or to support a verdict of a jury in favor of the Petitioner if so submitted.

Here Petitioner has deliberately chosen to aver in detail all the facts that the available evidence can show (Petitioner's Brief, p. 11 and 17).

Whether these facts, if proven, are of themselves sufficient to establish a prima facie right of recovery under the Federal Employer's Liability Act (Title 45, U.S.C.A. Sec. 51) must be determined by application of the principles of the common law. The Act of Congress does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur. *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649; 91 L. ed. 572.

In order to recover in this case it is necessary that Petitioner allege and prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. The essential test is as stated in *Tennant v. Peoria & Pekin Union Railroad Co.*, 321 U.S. 29, 88 L. ed. 520:

> "Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."

It is elemental that, in the essential matter of causation, the alleged negligence of the carrier must be a link in an un-

broken chain of reasonably foreseeable events. *Brady v. Southern Railway Co.*, 320 U.S. 476; 88 L. ed. 239.

When the essential facts are undisputed, whether they meet this test is a question of law, to be resolved by the court. Traditionally it is the function of the court, not the jury, to determine the legal sufficiency of the required allegations of facts in pleadings and to determine, after the evidence is concluded, whether the probative facts and the reasonable inferences therefrom meet the tests required. *Galloway v. United States*, 319 U.S. 372; 87 L. ed. 1458; *Eckenrode v. Pennsylvania Railroad Company*, 164 F. 2d. 996; affirmed U.S. ; 93 L. ed. 64 (Adv. Op. Nov. 15, 1948). Trial of such cases is not by jury alone but by the Court and the jury and the manner and procedure of trial is in good part determined by the law of the forum. This is aptly illustrated by the opinion in *Brady v. Southern Railroad Co.*, 326 U.S. 476; 88 L. ed. 239, in this language:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceedings by Non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This long established procedure was followed by the trial court in applying the foregoing clear doctrines many times affirmed by this Court. The decisions cited by Petitioner establish no principles to the contrary. There is no requirement in the Federal Employer's Liability Act or the 7th Amendment to the Constitution of the United States that Petitioner is entitled to have a jury pass upon her claim simply because she filed a suit. *Minneapolis & St. Louis Railroad Company v. Bombolis*, 241 U.S. 211; 60 L. ed. 961;

Galloway v. United States, supra; Eckenrode v. Pennsylvania Railroad, supra. The essential probative facts adduced must first measure up to the required standards.

The Supreme Court of Alabama applied these standards as they have been declared by this Court.

THE PARTICULAR COUNTS OF THE COMPLAINT

Applying these fundamental principles to the particular counts of the Complaint it is readily apparent that they are all insufficient to show a right of recovery on the part of Petitioner.

Count Ten (R-2 to 5, inc.):

By way of inducement this Count charges the Respondent with allowing tall canes to "grow and remain in very close proximity" to the track on which the train was running. In Count Eleven (R. 5 to 7, inc.) this track is alleged to be that of the Florida East Coast Railroad Company, not the track or property of the Respondent Atlantic Coast Line Railroad Company. Since it is not claimed that the deceased fell from the train at more than *one place*, the identification of the tracks and place in Count Eleven should be read into the other two counts in the same complaint. There is no other averment of any means or ability on the part of the Respondent to control in any way what grew or remained near the Florida East Coast Railroad tracks or that the defendant knew of the presence of such tall canes at any time before this train movement on the Florida East Coast tracks. These averments fall far short of showing any legal duty on the part of the defendant to take any action whatever in reference to the alleged tall canes and likewise fail to show that Respondent failed to use reasonable care to provide deceased a reasonably safe place to work.

This count then charges only that his allegedly required signal would not have been visible to the engineer and he would have been in danger of being struck and scraped off the side of the gondola car had he undertaken to give a signal from the side of the car "as the said gondola car *passed* the place where said tall canes were then and there growing." There is no averment that he *must* have given the signal *at that particular point* and it must be inferred that the deceased could have given such signal in the allegedly contemplated way *after the car passed the place where the tall canes were growing*, or before reaching it. Clearly this is insufficient to show that the effect of the canes was to interfere with the deceased's alleged contemplated act and, in fact, shows that he himself made a voluntary choice of an alternate method without any necessity therefor.

The ultimate and essential charge in this count is that these canes "caused" deceased to climb over the front end of the car to reach the tank car ahead in order to give the signal and that the canes "thereby" caused him to place himself in a "place of much greater danger" than he would otherwise have been had he gone over the side of the car, and then simply that while there he fell. It is not alleged that any agent or employee of defendant instructed deceased to adopt this alternate route or method nor are any facts alleged to show him under any compulsion whatever to do so.

In this count there is a failure of the facts to show either any negligent breach of duty by the defendant in failing to use reasonable care to furnish deceased with a reasonably safe place to work and complete failure of the facts alleged to establish any proximate causation between any act or failure to act by the defendant, *whether negligent or not*, and the fall of deceased from the train.

The Complaint's averment that the alternate route or method adopted by deceased was a place of "much greater danger" is tantamount to an admission that the place or route

was a reasonably safe place or route for the performance of his duties and unattended by any causative negligence on the part of the respondent.[1]

Of this Count Ten the Supreme Court of Alabama in its opinion (R-26) said:

> "Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader. As we have pointed out, the causal connection between the negligence complained of and the injury sustained cannot be left to mere speculation and conjecture. No where in count 10 is it made to appear what caused Reynolds to fall between the cars. Climbing or going from one car to another on a moving freight train, in the performance of their duties, is not unusual for trainmen such as Reynolds was. And although dangerous, the carrier cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment which cannot be eliminated by the carrier's exercise of reasonable care. *Ellis v. Union Pacific R. R.*, 91 L. ed. 433."

Some danger inheres in all employment and if there are more jobs than one it necessarily follows that the performance of one job will entail more danger than the performance

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[1]Compare Mobile Light and R. Co. v. Therrell, 205 Ala. 553, 88 So. 667 where the Court said:

"The first count of the complaint is without averment as to the unsafety or inconvenience of the place at which Defendant's car stopped, and at which plaintiff was injured in the course of his disembarkation, except only that it "was dangerous for a person walking on crutches," and there is no averment that plaintiff was walking on crutches. Manifestly, there was no duty resting on defendant to make stops and invite disembarkations only at places which were safe for persons "walking on crutches." Construing the complaint more strongly against the pleader, the stated conclusion that the place was dangerous for persons "walking on crutches" must be taken as a negation of danger for persons normally conditioned, and hence there is a failure to show a breach of defendant's legal duty in the premises."

of another. Dangerous work must be performed and work must be done in dangerous places. It is not the fact that work is dangerous or that injury occurs that constitutes negligence or creates liability on the part of the employer. The danger must have been created directly and proximately by the negligence of the employer. The fact that it is normally a part of a trainman's, and the deceased's, job to pass from car to car as the train is in motion is of such common knowledge that it is freely admitted by Petitioner (Petitioner's Brief, p. 16). He had to do so to get to the gondola car on which he was just before he fell.

The hazards and danger inherent in the job of trainman are ones deceased assumed—it is only that hazard and danger caused in whole or in part by demonstrable negligence of the Respondent which he would not assume. *Ellis v. Union Pacific*, 27 NW 2d 921 (926), (opinion rendered after the opinion by this Court reported in 329 U.S. 649, 91 L. ed. 433).

Count Eleven (R. 5 to 7 inc.):

The essence of this count is simply that deceased fell while he was performing duties which another employee, who was present and doing nothing whatever, should have ordinarily been performing and as the whole basis of asserted liability merely alleges as a conclusion that, in undertaking to perform the duties which he alleges would ordinarily have been performed by the other employee, deceased *was caused to quit a much safer place to work and the performance of much safer duties.* There is here no averment whatever that any act, skilled or unskilled, incompetent or competnt, or in any way negligent, on the part of the other employee caused or contributed in any way to the deceased's fall from the train. Nor is there any averment that the defendant negligently employed Skelly or negligently retained him in its employ after knowledge of any alleged incompetency. It nowhere appears in this count, or any other count for that matter, *how* or

why Reynolds was actually caused to fall from this train—but simply that in the course of performing the job at hand he did fall.

The count does not aver that any agent or employee ordered or directed deceased to perform the duties which might ordinarily have been performed by Skelly or that there was any rule of the employer so requiring. The only operative averment is that "as the only other brakeman on said train" Reynolds "was required to undertake the performance of the duties of the said Skelly." In the absence of any other averments of facts showing a necessity for Reynolds so to do, this averment can only have one of two alternative meanings (a.) that *as a matter of law* under the other facts set out, it was his duty to assume the performance of Skelly's ordinarily expected duties. If so, then it certainly would not constitute, at the same time, *negligence* on the part of his employer—there would be no violation by the employer of any duty owed to Reynolds; or (b) that Reynolds' undertaking to perform those duties was wholly voluntary on his part, unattended by any order or direction from the Respondent.

It must be borne in mind that nowhere in this count is it claimed or contended that the place of work or the duties which supposedly Skelly would ordinarily be expected to perform were in any way rendered unsafe by reason of any negligence on the part of the Respondent.

What has been said above generally and concerning Count Ten applies in large measure to Count Eleven and the applicable authorities already cited will not be again referred to.

In a comparable situation, the Circuit Court of Appeals, Ninth Circuit, in *Deere v. Southern Pac. Co.*, 123 F.2d 438, said:

> "When failure to provide sufficient help results in injury to an employee, there exists a ground of negligence which is recognized under the Federal Employers'

Liability Act (*Chesapeake & Ohio Ry. Co. v. Winder*, 4 Cir., 23 F. 2d 794), but to permit recovery in such case it must be shown that such failure was the proximate cause of the accident. *Marshall v. Chicago, etc., R. Co.*, 131 Minn. 392, 155 N.W. 208; *Stunks v. Payne*, 184 N.C. 582, 114 S.E. 840. To recover plaintiff is required to prove not only that the railroad was negligent, but that the injury resulted proximately from that negligence. *Healey v. New York, O. & W. R. Co.*, 2 Cir., 79 F. 2d 542. Here, the plaintiff contends that the speeder was too heavy for decedent to handle properly. But if it be conceded, arguendo, that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of plaintiff's decedent. His death was not owing directly to the act of removing the speeder, but was due proximately to his failure to step aside from the path of the train, the approach of which was fully known to him, as is evidenced by the fact that he had begun to remove the speeder from the way of the train. He was free to handle his own movements; there was no superior's order requiring him to stay with the car at the risk of his life. Under these circumstances reasonable men must agree that the accident was not brought about through any failure to furnish sufficient help, and there is therefore no question for the jury on this point."

Even if the route, method or duties undertaken by Reynolds at the time were more hazardous, as argued by Petitioner, than Reynolds might otherwise have been engaged in, there are no averments of any compulsion upon him. If an employee has a choice of ways to do a thing in the course of his employment and he voluntarily chooses the more dangerous way, his employer is not liable for injury resulting if the risk of injury is obvious and such as a man of ordinary prudence would avoid, except when the employee is in an emergency without an opportunity of deliberation or if the hazard in the choice is not clear. *Burnett v. Northern Pac.*

Ry. (Mont.) 124 Pac. 2d 307. Here there was no emergency. Reynolds must be taken under these averments as a skilled brakeman or trainman; if there was any unusual danger about what he was doing it was obvious to him and there is absence of any averment of any compulsion upon him to make the choice which he did.

Of this Count Eleven, the Supreme Court of Alabama in its opinion (R. 27) said:

> "Count 11 is subject to the same criticism as is count 10. The casual connection between the negligence complained of and the injury sustained is not made to appear, but is left to speculation and conjecture only.
>
> "Conceding that defendant did not provide sufficient help, yet there is no showing whatever of a direct causal connection between that omission and the death of Reynolds. It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause, which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death.—Authorities supra."

The inescapable intendment of this count is that had Skelly, the other employee, been doing the job exactly as did Reynolds and had fallen and died exactly as did Reynolds, there would have been no want of care and no liability on the part of the Respondent.

The controlling doctrine of the law does not permit a jury to speculate how an accident happened and then further speculate on what it was that the defendant did that was negligent and caused the accident. The continued building of inferences upon inferences is not countenanced. Inferences can only be properly drawn from probative facts themselves viewed in

the light of human experience. In whatever terms the doctrine may be variously expressed, the essential requirement is that mere speculation will not be allowed to do duty for probative facts. *Trust Company of Chicago v. Erie Railroad Company*, 165 F. 2d 806; *Galloway v. United States*, supra.

Count Twelve (R. 7 to 10 inc.):

By this count Petitioner simply combines Counts Ten and Eleven by inserting in Count Ten the principal averments of Count Eleven, by way of inducement in undertaking to set out the charge that in proceeding from one car to another Reynolds, the deceased, was allegedly doing the job Skelly, a fellow trainman, would ordinarily be expected to do, repeating the unsupported conclusion that the deceased was by the canes "caused to place himself in a place of much greater danger" after he had (apparently voluntarily) allegedly "quit a much safer place of work and the performance of much safer duties." It ends with the repetition of the conclusions averred in both Counts Ten and Eleven.

This count merely compounds the vice already inherent in the separate Counts Ten and Eleven, as already pointed out in the foregoing argument and authorities.

The Appellant seeks to draw a mantle of sufficiency over this prolix, insufficient and ineffective count by quoting from *Union Pacific v. Hadley*, 246 U.S. 330; 62 L.ed. 751; 38 S.Ct. 318.

Justice Holmes' remarks about the 'total being greater than the sum of the parts' were addressed to the *defendant's request to the trial court to address special interrogatories to the jury on various phases of the circumstances and which the trial court declined in proper exercise of discretion.* Now, of course, the Rules of Civil Procedure expressly contemplate special interrogatories to and findings by juries in District Courts. There could hardly have been any serious contention that running a train past block signal warnings when the

crew already knew in fact another train was close ahead was not negligence and the deceased's failure to further flag it was at best only contributory negligence, which was not then and is not now a defense. The provision of the statute which imposes liability if the injury "result in whole or in part from negligence of any of the employees" of the defendant makes necessary the removal of contributory negligence as a complete defense in the interest of consistency.

The Supreme Court of Alabama in its opinion (R. 27-28) aptly dealt with this further contention as to Count Twelve:

> "Count 12 is but a combination of counts 10 and 11. In support of count 12 appellant cites *Union Pacific R.R. v. Hadley*, 246 U.S. 330, 62 L. ed. 751, 3 S. C. 318, and *Blair v. Baltimore & Ohio R.R.*, 323 U.S. 600, 89 L. ed. 490, 65 S. C. 545. In the latter case, Mr. Justice Black, said: 'The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.' This principle has no application here. The defect in each count of the complaint is not in its failure to allege negligence, but failure to allege facts showing a causal connection between that negligence and the death of Reynolds. Count 12 is as defective in this regard as are counts 10 and 11."

Petitioner deliberately selected as the forum the state courts of the State of Alabama and deliberately chose the mode of stating and particularizing her complaint. Her case was fairly heard and the substantive doctrine was fairly applied by the courts in keeping with the state rules of practice and procedure. Petitioner is bound by the result.

CONCLUSION

Fundamentally the essence of the Complaint is simply that Petitioner's intestate met his death by falling from a train in the course of his employment in interstate commerce.

The Federal Employers Liability Act does not subject a railroad to that degree of liability imposed by a Workmen's Compensation law nor place the railroad in position of an insurer of its employees. If the railroad ought to bear the financial burden of every accident in the industry, the power to so prescribe is in Congress and not in the Courts. *Wolfe v. Henwood*, 162 F.2d 998 (1001); *Myers v. Reading Company*, 331 U.S. 477; 91 L. ed. 1615.

Standards of conduct and responsibility are essential to an orderly society. No standard has yet been devised by our law making bodies which perfectly insures recompense for every conceivable individual loss. The Federal Employer's Liability Act as deliberately written by the Congress is not an exception. This is fittingly illustrated as applied to the facts here by the language of the Circuit Court of Appeals, Third Circuit, in *Eckenrode v. Pennsylvania Railroad Co.*, 164 F. 2d. 996, (affirmed on certiorari Nov. 15, 1948, 93 L. ed. 64, Adv. op.) as follows:

> "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there

is negligence when it does not exist. It does not exist in this case."

The action of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned Peyton D. Bibb, Attorney for the Respondent, hereby certify that a copy of the foregoing Brief and Argument was served on J. Kirkman Jackson, Esq., Attorney for Petitioner, on the 23rd day of December, 1948.

This the 23rd day of December, 1948.

Peyton D. Bibb,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A Corporation,
Respondent and Appellee Below

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

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A Corporation,
Respondent and Appellee Below

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported in 36 So. 2d 102 (Adv. op.) and is set out in the record herein (R-22).

STATEMENT OF THE CASE

The essential record facts are set out in the Statement of the Case in the initial Brief and Argument on behalf of Respondent (Respondent's Brief, P. 3 to 6, inc.) and will not be repeated. They show that the judgment of the trial court (R-20) and its affirmance by the Supreme Court of Alabama (R-28) involved only the issue of the sufficiency of the pleadings—that is, the Petitioner's Complaint—as gauged by the rules of pleading applicable in the courts of the State of Alabama (R-23).

This Supplemental Brief and Argument is in further elaboration of the statement and argument on Page 18 of Respondent's Brief as follows:

"Petitioner deliberately selected as the forum the state courts of the State of Alabama and deliberately chose the mode of stating and particularizing her Complaint. Her case was fairly heard and the substantive doctrine was fairly applied by the courts *in keeping with the state rules of practice and procedure. Petitioner is bound by the result.*" (Emphasis supplied)

THE ARGUMENT

SUMMARY OF THE ARGUMENT

The opinion and judgment of the Supreme Court of Alabama involved only questions of the sufficiency of pleading under the law of the forum, "non-Federal" questions, and is therefore controlling and not subject to review.

ARGUMENT

Since this Court, in keeping with its practice, granted the petition herein for certiorari to the Supreme Court of Alabama (R-29), Respondent's Brief and Argument as initially filed herein dealt principally with the broader question that

the catalog of actual facts alleged by Petitioner is entirely inadequate to support a right of recovery aside from controlling questions of pleading, procedure and reviewability. This Supplmental Brief and Argument is therefore directed to other issues manifest in the record that the judgments of both the trial court and the Supreme Court of Alabama involved only questions of the sufficiency of Petitioner's pleading under the law of the state forum selected by Petitioner, which are "non-Federal" questions and therefore the judgment of the Supreme Court of Alabama is not subject to review by this Court under the doctrines historically adhered to by it.

In 2 Roberts' Federal Liabilities of Carriers, (Second Edition) 1905, it is declared that:

> "It is also a general rule of unquestioned authority that, in an action to recover damages for the injury or death of a railroad employee based upon the negligence of his employer, the form and sufficiency of the pleadings, like other considerations pertaining to practice and procedure not involving substantive federal rights, are controlled and determinable by the law of the place where suit is brought. This principle is none the less applicable although the action finds or is alleged by either party to find its substantive basis, in whole or in part, either in the Federal Employers' Liability Act or in some federal statute regulating railroad equipment and operation.
>
> "Questions of that nature, arising in connection with such actions when instituted in the courts of the United States, are therefore to be determined by an application of the rules of pleading which obtain in the federal courts, and such adaptations of local procedure as are contemplated by the Conformity Act. Similarly, the formal sufficiency of the pleadings in an action of this kind, when commenced in a state court, is to be tested by the same standards as are pleadings in other actions in such court."

It must be noted that since the publication of the authority above quoted, this Court has promulgated rules of civil pro-

cedure applicable to Federal Courts, which rules result in the Federal Courts not having to concern themselves with the rules of pleadings and practice in the State Courts insofar as actions filed in the Federal Courts are concerned.

Hence, that portion of the rule declared by Roberts, quoted above, relating to the Conformity Act is no longer applicable. *Zumwalt v. Gardner*, 160 Fed. 2d 298. But there is no question that as to actions instituted in the State Courts under the Federal Employers' Liability Act the sufficiency of the pleadings "is to be tested by the same standards as are pleadings in other actions in such court."

In the case of Central Vermont Railway Co. v. White, Administratrix of the Estate of Enoch L. White, 238 US 507, 35 S. Ct. 865, 59 L. ed. 1433, this Court, in reviewing a decision of the Supreme Court of Vermont, with respect to a cause of action commenced in the Vermont Courts, said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (M'Niel v. Holbrook, 12 Pet. 89, 9 L. ed. 1011)."

In *Mondou v. New York, H. H. & H. R. Co.*, 223 US 1, 56 L. ed. 327, this Court pointed out that it was neither the purpose nor the effect of the Federal Employers' Liability Act "to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." The question of sufficiency of pleadings in actions filed in State Courts is a non-federal question. Compare 45 USCA Sec. 51, Note 443.

There can be no question but that the decision or judgment of the Supreme Court of Alabama involved in the instant case relates solely to the sufficiency of Counts of the Complaint. This is manifest from the following:

1. The Minute Entry of the Circuit Judge of the Tenth Judicial Circuit of Alabama recites: "It is ordered and adjudged by the court that said demurrer be and the same is hereby sustained; on account of and solely because of the court's sustaining the amended demurrer to Counts Ten, Eleven and Twelve, the plaintiff moves the court for a nonsuit, with notice of appeal to the Supreme Court * * *." (R-20)

2. Each assignment of error of the appellant in the Supreme Court of Alabama related to, and was confined to, rulings by the Circuit Court on the demurrer to the plaintiff's complaint or some Count thereof. (R-22)

3. The opinion rendered by the Supreme Court of Alabama (R-23) clearly shows that the basis of the decision by the Court was the insufficiency of the Counts of the Complaint. Of course, that was the only question before the Supreme Court of Alabama.

In the case of *Radio Station WOW, Inc., v. Johnson*, 323 US 705, 65 S. Ct. 276, 89 L. ed. 569, this Court, in holding that where a State Court's decision rests both upon its determination of a federal question and upon an independent non-federal question, the Supreme Court of the United States will not consider the correctness of the non-federal ground, said:

> "But it is not for us to consider the correctness of the non-Federal ground unless it is an obvious subterfuge to evade consideration of a Federal issue."

Under the rule above stated by this Court in the case of *Central Vermont Railway Co. v. White*, Administratrix of the Estate of Enoch L. White, supra, to the effect that sufficiency of pleadings is a non-federal question, the Supreme Court of the United States will not consider the correctness of the conclusion reached by the Supreme Court of Alabama with respect to such non-federal question, unless the decision

of the State Court with respect thereto "is an obvious subterfuge to evade consideration of a Federal issue." *Radio Station WOW, Inc. v. Johnson, supra.*

It is quite apparent that the opinion of the Supreme Court of Alabama is no subterfuge to evade consideration of a federal question. It would unduly, and unnecessarily, lengthen this Supplemental Brief to set forth in full the opinion of the Supreme Court of Alabama. It is included in the Record (R-22 to 28, inc.). We are confident that it will readily appear to this Court that there is absolutely no basis for any suggestion, much less a conclusion, that the opinion of the Supreme Court of Alabama constitutes subterfuge to evade the consideration of a federal issue. For such opinion, instead of evading any issue, considers the only issue presented to the Supreme Court of Alabama—that is, the sufficiency of the pleadings. That question, we reiterate and emphasize, is solely and purely a non-federal question.

As further demonstrating that no semblance of subterfuge inheres in such opinion, we invite attention to the following statement appearing in said opinion: (R-26):

> "The most that can be said of count 10 is that defendant's alleged neglignt failure to furnish deceased with a reasonably safe place to work consisted in allowing tall canes to grow in close proximity to the railroad track, and which negligence caused plaintiff's intestate, Reynolds, to pursue a different course of conduct, and one alleged to be more hazardous from that ordinarily followed in signaling the engineer, and that while pursuing said different course of conduct he fell between the cars and was killed. Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader."

We respectfully invite this Court to consider the similarity in the process of reasoning by which the Supreme Court of Alabama in the instant case reached the conclusion that Count Ten (R-2 to 5, inc.) was defective and the process of reasoning by which the Supreme Court of Alabama reached the conclusion that the First Count of the Complaint was defective in the case of *Mobile Light & R. Co. v. Therrell*, 205 Ala. 553, 88 So. 667, wherein the Supreme Court of Alabama said:

> "The first count of the complaint is without averment as to the unsafety or inconvenience of the place at which Defendant's car stopped, and at which plaintiff was injured in the course of his disembarkation, except only that it 'was dangerous for a person walking on crutches', and there is no averment that plaintiff was walking on crutches. Manifestly, there was no duty resting on defendant to make stops and invite disembarkations only at places which were safe for persons 'walking on crutches.' Construing the complaint more strongly against the pleader, the stated conclusion that the place was dangerous for persons 'walking on crutches' must be taken as a negation of danger for persons normally conditioned, and hence there is a failure to show a breach of defendant's legal duty in the premises."

In the instant case, and in the *Mobile Light & R. Co. v. Therrell case, supra*, the respective counts under consideration were subject to the objection, or defect, of failure to allege that the place involved "was not reasonably safe". It is significant that no federal question whatsoever was involved in the *Mobile Light & R. Co. v. Therrell case, supra*. Hence, the Supreme Court of Alabama without any federal question present for the evasion of which subterfuge might be possible, has held a count defective for substantially the same reasons as Count Ten, involved in the instant case, was held to be defective by the Supreme Court of Alabama. There is absolutely no basis for believing that the opinion of the Supreme Court of Alabama in the instant case is a device, or subterfuge, to evade

the consideration of a federal question; for the Supreme Court of Alabama has reached the same conclusion as was reached in earlier cases, where no federal question is involved. This, of course, is aside from the fact that a disposition to evade the supreme law of the land should not be imputed to the Supreme Court of Alabama, or any other State Court, in the absence of cogent and forceful indications of such disposition.

In *Lynch v. New York ex rel Pierson*, 293 US 52, 55 S. Ct. 16, 79 L. ed. 191, this Court declared:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Compare *Radio Station WOW, Inc. v. Johnson, supra.* This Court has expressly held, in accordance with the rule enunciated in the *Lynch v. New York ex rel Pierson case, supra*, that the decision of a State Court in a Federal Employers' Liability Act case is not subject to review by the Supreme Court of the United States, where such decision rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. ed. 789.

CONCLUSION

We respectfully insist that the only question involved in this case as presented to the Supreme Court of Alabama was the sufficiency of the pleadings. As the sufficiency of the pleadings is a non-federal question, and as the sole ground of the decision by the State Supreme Court was the insufficiency of the pleadings, no question for review by this Court is presented. If, however, it be said that a federal question was also involved, then certainly the basis and ground of the decision of the State Supreme Court was its determination of the sufficiency of the pleadings. Therefore, the rule enunciated in *Lynch v. New York ex rel Pierson, supra*, and *Radio Station WOW, Inc., v. Johnson, supra*, to the effect that where the judgment of the State Court rests on two grounds, one of which involves a non-federal question, the Supreme Court of the United States will not assume jurisdiction, applies. See also *Loftus v. Illinois*, 92 L. ed. 1294 (decided June 14, 1948) and *Hedgebeth v. North Carolina*, 92 L. ed. 1296 (decided June 14, 1948).

This proceeding should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned Peyton D. Bibb, Attorney for the Respondent, hereby certify that a copy of the foregoing Brief and Argument was served on J. Kirkman Jackson, Esq., Attorney for Petitioner, on the 31st day of December, 1948.

This the 31st day of December, 1948.

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